No. 6[illegible]58

FILED
SEP 30 1918
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

Nos.

PIEDMONT & GEORGES CREEK COAL COMPANY,
Libelant-Petitioner,

against

The Fishing Steamer WALTER ADAMS and others,
SEABOARD FISHERIES COMPANY,
Claimant-Respondent.

The Fishing Steamer HERBERT N. EDWARDS,
SEABOARD FISHERIES COMPANY,
Claimant-Respondent.

The Fishing Steamer ROLLIN E. MASON,
SEABOARD FISHERIES COMPANY,
Claimant-Respondent.

The Fishing Steamer WILLIAM B. MURRAY,
SEABOARD FISHERIES COMPANY,
Claimant-Respondent.

The Fishing Steamer MARTIN J. MARRAN,
SEABOARD FISHERIES COMPANY,
Claimant-Respondent.

The Fishing Steamer AMAGANSETT,
SEABOARD FISHERIES COMPANY,
Claimant-Respondent.

(CONSOLIDATED CASE.)

PETITION FOR WRIT OF CERTIORARI AND BRIEF FOR PETITIONER.

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
F. C. NICODEMUS, Jr.,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

PIEDMONT & GEORGES CREEK COAL COMPANY,
Libelant-Appellee,
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AGAINST

Fishing Steamers *Walter Adams, et al.*, Seaboard Fisheries Company, Inc.,
Claimant-Appellant-Respondent.

Fishing Steamer *Herbert N. Edwards*,

SAME *vs.* SAME.

Fishing Steamer *Rollin E. Mason*,

SAME *vs.* SAME.

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SAME *vs.* SAME.

Fishing Steamer *Martin J. Marran*,

SAME *vs.* SAME.

Fishing Steamer *Amagansett*,

SAME *vs.* SAME.

SIRS:

PLEASE TAKE NOTICE that, in pursuance of sub-division 4 of Rule 37 of the Supreme Court of the United States, the annexed petition for a writ of certiorari, the brief in support thereof, and the certified record of the Circuit Court of Appeals, for the First Circuit herein, were duly filed in the office of the Clerk of the United States Supreme Court within the period prescribed by law; and that this fact will be called to the attention of the Court, and the petition for certiorari submitted at the opening of court on Monday, the 7th of October, 1918, or so soon thereafter as counsel may be heard.

New York, September, 1918.

Yours, &c.,
KIRLIN, WOOLSEY & HICKOX,
FRANK HEALY,
Proctors for Petitioner.

To:

MESSRS. GARDNER, PIRCE & THORNLEY,
MESSRS. SULLIVAN & CROMWELL,
Proctors for Respondent.

SUPREME COURT OF THE UNITED STATES.

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Fishing Steamer *Amagansett*,

SAME *vs.* SAME.

Petition for Writ of Certiorari.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Piedmont & Georges Creek Coal Company respectfully shows to this Honorable Court as follows:

I. This is a petition for a writ of *certiorari* to review a final decision of the Circuit Court of Appeals for the First Circuit made and entered in the said Circuit Court of Appeals on the 21st day of June, 1918, by which the decision of Judge Arthur Brown of the United States District Court for the District of Rhode Island, in favor of this petitioner, was reversed, and it was ordered that the case be remanded to the District Court for the District of Rhode Island with instructions to dismiss the libel.

On motion duly made the issuance of the mandate of the Circuit Court of Appeals was ordered stayed until further order of that Court pending the application for this writ of *certiorari*.

II. The cases were consolidated by order of the District Judge of the District of Rhode Island.

The facts are undisputed and the question which has arisen involves the construction to be put on the Lien Act of June 23, 1910, Ch. 373, 36 Stat. 604,* under the state of facts which will be hereinafter set forth.

* Act of June 23, 1910, c. 373, 36 Stat. 604.

SEC. 1. Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a

III. The question to be passed on in this case is whether when it is the undisputed fact that a supplier of coal has furnished coal solely on the agreement by an insolvent shipowner that the supplier shall have a lien on the vessels of the owner's fleet for such coal as is furnished, the ship owner or the ship owner's mortgagee can defeat liens claimed by the coal supplier on individual vessels of the fleet for coal actually used by such vessels because the coal was first delivered to the ship owner who apportioned it among his vessels as was convenient.

In other words why cannot a coal supplier follow his coal through the ship owner's bins to the ship owner's vessels and maintain a lien on the vessels when it is agreed that the supplier shall have such a lien although

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maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

SEC. 2. The following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

SEC. 3. The officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

SEC. 4. Nothing in this Act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this Act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam.

SEC. 5. This Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries.

the coal is not delivered directly to the several vessels by the supplier?

The District Judge took a broad view of the statute and construed it so as to make it applicable to modern conditions of furnishing coal and other necessaries to vessels. He sustained liens against each vessel for the coal each vessel had used.

The Circuit Court of Appeals reversed the decision of the District Judge, held the liens were not maintainable because the distribution of the coal among the several vessels had been left to the shipowner. In so holding, the Circuit Court of Appeals took a view of the statute which is extremely narrow, and renders the statute practically inoperative in many situations which arise under the modern practice of furnishing necessaries to vessels, and which the petitioner believes were intended to be covered by the statute.

The question, therefore, is one of considerable public importance especially at a time when persons furnishing necessaries to ships should be specially safeguarded in their security in order that there shall not be any difficulty or delay in securing coal and other necessaries for vessels.

The petitioner is advised that although the Lien Act of June 23, 1910, is one of the most important statutes having to do with maritime affairs, it has never been before this Court for construction.

IV.—*Explanation of the Proceedings.*

These are consolidated causes consisting of a series of libels brought by the Piedmont & Georges Creek Coal Company, a Maryland corporation, hereinafter referred to as the Coal Company, against the Fishing Steamers *William B. Murray, Rollin E. Mason, Herbert N. Edwards, Martin J. Marran, Amagansett, Walter Adams, Alaska, Arizona, George Curtiss, Montauk, Quickstep,* and *Ranger,* hereinafter called the Fishing Steamers, to recover the sum of $17,850.75 with interest, for coal furnished on the credit of the said fishing steamers at the request of their then owner, The Atlantic Phosphate & Oil Corporation, hereinafter referred to as the Oil Corporation, during the fishing season of 1914.

The decision of the District Court is reported as *The William B. Murray, et al.,* 240 Fed. 147. The decision of the Circuit Court of Appeals has not been reported.

The coal in question had been furnished in boat load lots for use by the Oil Corporation's steamers to two coaling stations of the Oil Corporation,—one at Promised Land, Long Island, and one at Tiverton, Rhode Island, on an agreement that the coal company should have a lien therefor on all the vessels of the Oil Corporation's fleet. *Record,* pp. 31, 47, 92.

The first appearance of the appellee herein was by way of intervening libels or petitions in five libels theretofore filed against five vessels, the *Edwards,* the *Murray,* the *Marran,* the *Mason,* and the *Amagansett,* which were then under arrest in libels brought by other parties and against which the Oil Corporation had requested the libelant to enforce its lien instead of libelling the whole fleet.

These five intervening libels came on for trial on June 14, 1915, and testimony was taken on that date in open court.

The five libels mentioned each contained two counts:

1. For a share of the general lien indebtedness of the fleet to the libelant which the Oil Corporation had asked the libelant to enforce against these five vessels and

2. *For the coal actually used by the particular vessel libeled.* *Libels*, pp. 2, 3, 203, 204, 249, 250, 287, 288, 325, 326, 363, 364; *Horton*, p. 73.

During the progress of the trial the District Judge expressed doubt as to the feasibility of holding five vessels for supplies furnished to vessels other than those libelled. *Record*, p. 75. The appellee thereupon libeled the seven other fishing steamers above mentioned which were the only other vessels of the fleet then within reach of process. *Record*, p. 1.

On June 21, 1915, on motion, which was contested, leave was granted the libelant to sever the intervening libels or petitions filed in the first five causes from their principal proceedings and to consolidate the said five petitions with the new libel. An appropriate order was duly entered in each of the five causes first mentioned and in the new cause. *Record*, pp. 217, 260, 298, 336, 374.

Thereafter, by stipulation, the testimony which had been taken in the five libels was put into the consolidated cause, with certain additional facts and testimony duly set forth. *Record*, pp. 93, 94, 95.

The consolidated causes, therefore, consist of libels against all the fishing vessels of the fleet of the Oil Cor-

poration which were then available within the jurisdiction of the District Court when the proceedings were begun. *Record*, pp. 93, 94, 95.

All the vessels included within this consolidated cause were described in and subject to a certain mortgage or deed of trust given by the Oil Corporation to the Astor Trust Co., as trustee, bearing date July 1, 1913. *Record*, pp. 93, 94, 95.

On December 29th, 1914, the Astor Trust Co., as trustee, filed a bill of complaint praying foreclosure and sale under said mortgage and on March 8, 1915, a decree of foreclosure and sale was duly entered. *Record*, pp. 93, 94, 95.

On April 24, 1915, all the vessels included in this libel were sold at public auction by the *receivers* of the Oil Corporation and were purchased by the claimant-appellant herein and were duly transferred to it on May 29, 1915. *Agreed state of facts, Record*, pp. 93, 94, 95.

As this sale was not the result of a proceeding *in rem*, it did not cut off the libelant's liens, *Hudson v. N. Y. & Albany Trust Co. &c.*, 180 Fed. 973, C. C. A., 2nd Circuit, and is mentioned only that the Court may have the entire background of the proceedings before it.

V. *The District Judge correctly ruled that the coal furnished to the Oil Corporation for use on its vessels constituted supplies furnished to those vessels within the meaning of the Lien Act of June 23, 1910, for which a maritime lien for the coal actually used by each vessel might be enforced by a proceeding in rem against that vessel. The Court of Appeals erred in ruling otherwise.*

The facts are simple and are not disputed by any evidence on behalf of the claimant.

In February, 1914, the Oil Corporation was indebted to the Coal Company in the sum of $3800 for which indebtedness, sometime in the summer of 1913, a note secured by bonds of the Oil Corporation was given. *Meadows*, Q. 8; *Brophy*, Q. 5.

At that time the Oil Corporation had between $75,000 and $100,000 of overdue accounts payable on their books owing to their various creditors, which dated back to the previous year, and which it was unable to pay. *Meadows*, Q. 9.

It was on the verge of a receivership and existed as a going concern only by the sufferance of its creditors. *Meadows*, Q. 10, 11. These facts were known to the Coal Company, *Meadows*, Q. 15, *et. seq.*; *Brophy*, Q. 63, 65, whose president had issued orders not to extend any further credit to the Oil Corporation. *Brophy*, Q. 66.

The Coal Company tried unsuccessfully to collect from the Oil Corporation the balance due from 1913. *Meadows*, Q. 15.

The Oil Corporation had a total of nineteen fishing vessels in their fleet, all of which consumed coal, and it was necessary that coal be obtained in order that their vessels might continue in operation to secure fish to be made into oil at the company's plants. *Meadows*, Q. 12, 13, 14. They tried to obtain coal from the Coal Company by giving as collateral certain bonds of the Oil Corporation held in their treasury unsold, *Meadows*, Q. 17, 18, 19, but

the Coal Company was unwilling to make a contract based on the bonds as the only security. *Meadows*, Q. 17, 18, 19.

Some time in the latter part of February or the early part of March, 1914, Mr. Bohannon, the New York representative of the Coal Company, had a conversation with Mr. Meadows, the Vice President of the Oil Corporation, in the course of which Mr. Meadows told Mr. Bohannon that his understanding of the law was that the Oil Corporation had a perfect right to pledge the credit of the steamers, themselves, in order to obtain coal with which to operate them, and that if the Coal Company would furnish coal, the Oil Corporation would be willing to secure such deliveries by a maritime lien on all their steamers. *Meadows*, Q. 20, 21, 22, 23, 24. No formal writing evidenced the undertaking, but subsequent letters were exchanged which referred to an agreement or understanding and which conclusively proved that the matter was thoroughly understood by both parties. *Libelant's Exhibits* 1, 2, 3, 4, 5, 6; *Meadows*, Q. 25-31; *Meadows*, Recalled, Q. 12.

The agreement to furnish coal, therefore, was entered into upon the express understanding that for the coal furnished the libelant would get a maritime lien upon all the steamers owned by the Oil Corporation. *Meadows*, Q. 23; *Brophy*, Q. 69, 70.

Nine cargoes of coal were furnished by the Coal Company in pursuance of this agreement. *Meadows*, Q. 25, 26, 27. Of the nine shipments, only two were paid for. *Meadows*, Q. 31. *Brophy*, C.Q. 83, 84. They were the third and fourth shipments made under this agreement, *Meadows*, Q. 32; *Brophy*, C.Q. 83, 84, and the sum paid was $3,524.40 for 1,968 tons delivered at Promised Land. *Meadows*, Q. 31.

For the first two cargoes shipped under this agreement notes were given, to which bonds of the Oil Corporation were attached as collateral, *Meadows*, Q. 43. These notes were discounted at a bank by the Coal Company, thus permitting them to have the use of the money represented by the two cargoes in question, *Meadows*, Q. 35, 37.

The last five cargoes shipped under this agreement, which contained the coal involved in this case, were delivered in the months of May and June with specific dates for cash settlement stipulated. No notes were given for these. They were furnished solely in reliance on the agreement to give a maritime lien on the fleet as security for them. The coal covered by these five shipments has not been paid for. *Meadows*, Q. 38, 39 .

When the bills for the last five shipments became due and were not paid in due course and on demand being duly made, the Oil Corporation earnestly requested the Coal Company not to enforce its lien for a few days, and the Coal Company complied with this request, realizing that any summary action on its part would result in a collapse of the Oil Corporation. *Meadows*, Q. 44, 45, 46.

During this period of forbearance, the Oil Corporation went into the hands of a receiver.

Among the vessels belonging to the fleet upon all of which it was agreed that the libelant should enforce its maritime lien were the *Edwards*, the *Mason*, the *Marran*, the *Amagansett* and the *Murray*, which were considered the best of the ships. *Meadows*, Q. 44, 45, 46, *Libelant's Exhibits* 2 and 3. At the solicitation of the

Oil Corporation the Coal Company consented to enforce a lien for the coal unpaid for against these five best boats, because all parties considered that a sale of these five would bring sufficient money to pay the lien claim. *Meadows*, Q. 45.

The situation, in so far as the libelant's lien on the entire fleet was concerned, was not changed in any particular by its proceeding against five vessels for security for its claim, *Meadows*, 48, because by so doing, it permitted the balance of the fleet to operate.

It was felt that this might result in the Oil Corporation regaining its solvency. For there is an element of luck or chance in a fishing venture, and an unusual catch of oil-yielding fish might have saved this business, then top-heavy with liabilities.

Judge Brown, in his opinion, at page 128 of the *Record*, analyses the situation succinctly as follows:

> "I am of the opinion that the testimony shows that before the writing of the letters, *Exhibits* 8 and 9, the financial ability of the Oil Corporation to pay was discussed; and that it was understood by the contracting parties that the law would afford a lien upon the vessels for the coal, and that the Coal Company would thus have security. It was also understood by the parties that a large part of the coal furnished was to be used by vessels of the fleet.
>
> "The Statute of June 23, 1910, gives no authority for the creation of a maritime lien on vessels to which coal was not to be furnished. An agreement that certain vessels should be charged with a lien for coal furnished to other vessels could have no effect to create a maritime lien which

should take precedence of an existing mortgage. Even if the Coal Company expected that it was getting security upon the entire fleet irrespective of what use should be made of the coal, this was an erroneous conception of legal rights. However, it seems just to hold that the parties contracted in view of the fact that the statute afforded a right to a maritime lien, and that even if they misconceived the extent of this right or the mode of its enforcement, the libellant may be entitled to such a maritime lien as may arise under the statute upon the facts of the case.

"That bills were made out and charges made to owners, or that notes were given, does not destroy the lien given by the act of June 23, 1910. The parties must be presumed to have contracted with so important a provision in mind; and though it might be a defense that the lien has been waived, we should require satisfactory and definite proof of such intention in order to deprive the libellant of such security as may be afforded by the statute.

"As it appears from the testimony that the contract covering the coal in question was made at a time when it was known to the libellant that the Oil Corporation was still in arrears for coal for the preceding year, and was otherwise heavily indebted, and that receivership proceedings were contemplated, it is quite clear that the libellant had no intention to waive any of its legal rights to a maritime lien."

It is perfectly clear that on the facts in this case, which are undisputed, the District Judge was correct in his ruling, on page 132, where he said:

"I find, therefore, that in contracting for this coal it was understood by both parties that it was to be principally used for strictly maritime pur-

poses; that a large part of it was used for such purposes; and that the parties contracted in view of statutory rights to a lien.

"It may be argued that when coal is delivered to bins on the wharf of a purchaser, who may use it as he pleases, on such of his ships as he may select, or upon land if he prefers, that the coal is furnished to the owner and not to a vessel. But such an argument upon the evidence in this case ignores the material fact that it was understood by both parties that the coal was procured and supplied largely for uses which were strictly maritime.

"Doubtless a very substantial part of the inducement to the Coal Company to supply the coal was its knowledge of its intended use, by vessels, for maritime purposes, and its understanding that the law gave it a lien for coal supplied for such purposes. Upon the facts in this case it is most improbable that the coal would have been supplied to the owner and upon the owner's very doubtful credit.

"I find that it was furnished because it was destined and intended to be used, in large part, by vessels; and that in the sense of the statute it was therefore furnished to vessels upon the faith of a lien thereon, and not to the owner."

Again, on page 134, the District Judge deals most properly with the question of sustaining maritime liens for supplies furnished to fleets: [Italics ours.]

> "As supplies for fleets of vessels under a common ownership and management in the ordinary course of business are contracted for in view of the general requirements of the entire fleet; as supply men will thus be called upon to furnish supplies in advance of the arrival of the vessels;

as, at the time supplies are ordered, there may be uncertainty as to which vessel may require them and use them; *the statute should receive a construction which will make it applicable to and consistent with modern business conditions.* A supply man who furnished supplies ready for any vessel of a fleet that may call for it should not be deprived of the same right to a lien as a supply man who is told the name of the vessel which is to require the supplies.

"The appropriation of the coal to a particular vessel, though made by the owner, yet, if done in pursuance of the course of business contemplated by the parties, must be regarded as completing a 'furnishing' by the libellant to 'a vessel,' which is identified by the act of the owner in placing the coal aboard.

"Cases which hold that supplies may be furnished to a vessel though not actually incorporated in or used by the vessel have no bearing in this case. While use and appropriation may not, in all cases, be necessary to make out a case of furnishing to a vessel, it does not follow that they may not afford conclusive evidence of the identity of a vessel and of the completion of a maritime lien thereon.

"But the question of the effect of an appropriation to a particular vessel I regard as settled by the decisions of Mr. Justice Curtis, and Judge Putnam, heretofore cited. In these cases it was at the outset uncertain which of two vessels might receive the supplies In the present case it was uncertain which vessels of a fleet might receive them; but in this case, as in the cases cited, the uncertainty ended upon the owner's appropriation of the coal to special vessels.

"Following the decisions of Justice Curtis in *The Kearsarge*, 2 Curtis 421, Fed. Cs. No. 7762,

> and of Judge Putnam in *Berwind-White Coal Mining Co.* vs. *Metropolitan S. S. Co.*, 166 Fed., 784, I am of the opinion that for such coal as actually went into any vessels of the fleet the libellant is entitled to a maritime lien, upon such vessel; but that there can be no lien upon one vessel for coal supplied to another vessel. See also *The Yankee*, 233 Fed., 917, 927."

The Circuit Court of Appeals admitted that there was little or no dispute as to the material facts, and that those facts were for the most part set forth in the opinion of the Judge. Record, p. 404.

It differed with him, however, as to the conclusions to be drawn from the facts. It held because some of the coal was for use at the factory of the Oil Corporation, Record, p. 405, the fact that most of it was used for the vessels, under an agreement that there should be a lien on the vessels, did not bring the case within the admiralty jurisdiction. PP. 407-8.

It further held that an agreement between a coal supplier and a ship owner to furnish coal for a fleet during a season, would not be regarded as maritime, and that, consequently, it would be very doubtful whether a maritime lien, by agreement, could be created for coal so furnished. P. 408.

This part of the Court's opinion is *obiter dictum*. The District Court had held that no maritime lien could be created apart from the statute, and gave a decree on the second count of the libels, wholly rejecting the first count. No cross appeal was taken by the libelant, and the only question before the Circuit Court of Appeals was whether in view of the understanding of the parties that the coal was furnished on the credit of the vessels

and not on the credit of the owner a lien was impressed upon the libeled vessels by force of the statute.

Judge Dodge, after discussing the questions, which would have arisen if the District Court had sustained the first count of each libel instead of the second count, proceeded to the construction of the statute, and said that the libelant-petitioner had not proved that it had furnished any coal to a vessel within the meaning of Section 1 of the statute, and that as it had not proved this, there could not be any liens against the several boats who used the libelant's coal.

It differentiated the cases of *The Kiersage*, 2 Curtis, 421; and the *Berwind-White etc. Co.* v. *Metropolitan etc. Co.*, 166 Fed., 784; 173 Fed. 271; on the ground that the statutes of Maine and of New Jersey, referred to in those cases, were statutes giving liens in connection with the construction of vessels, and hence not maritime.

The opinion concluded, p. 412,

> "We are unable to believe, in view of all the above, that the provisions of the statute can properly be understood in the less restricted sense accepted by the District Court, according to which, although the libelant had obtained no lien upon any vessel in the Oil Corporation's fleet when it parted with its coal by delivery to said corporation, liens in its favor might afterward be created by the Oil Corporation's subsequent acts in selecting particular vessels out of said fleet to receive portions of the coal which had been so delivered."

It is difficult to see why, in view of the agreement that the libelant petitioner should have liens for the coal furnished for use on the Oil Corporation's fleet, it should

not have been held that the Oil Corporation, in delivering the coal in pursuance of this agreement to the different vessels so acting as the agent of the libelant-petitioner, and hence that the libelant-petitioner was entitled to trace the coal which it furnished for use of the fleet into the particular vessels of the fleet which used it, and sustain liens against them for the amount that each used.

It is submitted that the District Judge was right in sustaining the liens and that the Circuit Court of Appeals was clearly wrong and that its decision conflicts with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *The Yankee*, 233 Fed. Rep., 919.

VI. Your petitioner is informed and believes that the case involves questions of gravity and importance in admiralty law in regard to the construction and application of the Lien Act of June 23, 1910 which have never been passed on by this court.

These questions are of great importance to the suppliers of coal and other necessaries to ships under modern conditions, especially at the present time, and the decisions of the various Circuits seem to be at variance in regard to them.

The case should, therefore, it is submitted, receive the consideration of this Court.

VII. The petitioner has duly filed herewith a certified copy of the record and all proceedings in the Circuit Court of Appeals and prays that the same may be reviewed by this Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit

Court of Appeals for the First Circuit commanding said Court to certify and send to this Court on a day to be designated in said writ a full and complete certified transcript of the record and all proceedings in the said Circuit Court of Appeals in the said consolidated cases which were entitled in the said Circuit Court of Appeals for the First Circuit: No. 1327, *Fishing Steamers Walter Adams et al. Seaboard Fisheries Company, Inc., Appellant*, v. *Piedmont & Georges Creek Coal Company, Appellee;* No. 1328, *Fishing Steamer Herbert N. Edwards, Same* v. *Same;* No. 1329, *Fishing Steamer Rollin E. Mason, Same* v. *Same;* No. 1330, *Fishing Steamer William B. Murray, Same* v. *Same;* No. 1331, *Fishing Steamer Martin J. Marran, Same* v. *Same;* No. 1332, *Fishing Steamer Amagansett, Same* v. *Same,* to the end that the said consolidated cases may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An Act to establish Circuit Court of Appeals and to define and regulate in certain cases the Jurisdiction of the Courts of the United States and for other purposes, approved March 3, 1891, and the acts amendatory thereof and supplementary thereto, or that your petitioner may have such other and further relief and remedy in the premises as to this Court may seem proper and in conformity with the said Act; and that the decision or decree of the Circuit Court of Appeals for the First Circuit, reversing the decision or decree of the District Court for the District of Rhode Island and ordering that the libels in the consolidated cases should be dismissed may be reviewed in this Court and reversed.

And your petitioner will ever pray.

PIEDMONT & GEORGES CREEK COAL COMPANY,
By
KIRLIN, WOOLSEY & HICKOX,
Attorneys.

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
F. C. NICODEMUS, JR.,
Counsel for Petitioner.

STATE OF NEW YORK,
County of New York, } ss.:

MARK W. MACLAY, being duly sworn, says:

I am a member of the firm of Kirlin, Woolsey & Hickox, attorneys for the petitioner herein.

The foregoing petition is true to the best of my knowledge, information and belief.

The reason why this verification is not made by the petitioner is that it is a corporation, and the reason it is not made by one of its officers is that none of its officers is within this District.

This application is made in good faith and not for the purpose of delay.

MARK W. MACLAY.

Sworn to before me this 10th
day of September, 1918.
P. RANDOLPH HARRIS,
Notary Public,
New York County.

CERTIFICATE.

I HEREBY CERTIFY that I have examined the foregoing petition and that, in my opinion, it is well founded and entitled to the favorable consideration of this Court.

JOHN M. WOOLSEY.

SUPREME COURT OF THE UNITED STATES.

PIEDMONT & GEORGES CREEK COAL COMPANY,
Libelant-Appellee,
Petitioner,

AGAINST

Fishing Steamers *Walter Adams, et al.*, Seaboard Fisheries Company, Inc.,
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BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

The facts are quite fully set forth in the petition for certiorari with which this brief is submitted but a further discussion of them may be helpful.

The facts are not in dispute, and this Court is not asked by this petition to pass on any question of facts.

It is asked to decide a question of the construction of the Lien Act of June 23, 1910, as applied to the circumstances set forth in the petition.

STATEMENT.

(a) *Purpose of Application.*

The petitioner, the libelant in the District Court for the District of Rhode Island and the prevailing party in the District Court, applies to this Court for a writ of certiorari to review a decision of the Circuit Court of Appeals for the First Circuit (opinion written by Judge Dodge) which the petitioner contends places an erroneous and subversive construction on the act of Congress of June 23, 1910, 36 stat. 604 governing Maritime Liens, rendering the statute inoperative in an important class of cases it was intended to reach.

(b) *The facts upon which the petitioner asks the writ of certiorari.*

As stated by Judge Dodge at the outset of his opinion written for the Circuit Court of Appeals:

> "There is little or no dispute as to the material facts. They are for the most part suffi-

ciently set forth in the opinion below. *The William B. Murray et al.* 240 F. R. 147."

For a full statement of all of the facts in evidence reference may be made to the opinion of the District Court, as well as to the opinion of Judge Dodge. Much that is stated in Judge Dodge's opinion is, however, inaccurate in detail and in any event does not bear upon the construction of the act of Congress and is not material upon the present application. The facts upon which the Circuit Court of Appeals considered the Act of Congress and reached the determination which the petitioner asks this Court to review are undisputed and may be briefly stated.

The Atlantic Phosphate & Oil Corporation, a body corporate created under the laws of New York (herein called the Oil Corporation) owned and operated on the Atlantic Seaboard a fleet of 19 steam fishing vessels of which 17 were actually in service at the time of the transaction involved in this litigation. The fleet had its principal bases at Tiverton, Rhode Island and Promised Land, New York, where factories of the Oil Corporation were located and where its vessels came from time to time to take on supplies.

All the property of the Oil Corporation, including its fleet of vessels above mentioned, was subject to the lien of a mortgage to the Astor Trust Company as Trustee securing an issue of bonds which were outstanding when the Oil Corporation and the Petitioner entered into the arrangement underlying the present proceeding.

The mortgage was foreclosed under a decree dated March 8, 1915, and the vessels were purchased by the claimant, subject to any valid maritime liens thereon held by the Petitioner.

The maritime liens asserted by the Petitioner rest upon the following facts:

In 1913 and 1914 the Oil Corporation being largely indebted upon overdue open accounts and defaulted notes secured by its own bonds as collateral, was on the verge of a receivership and existed as a going concern only by the sufferance of its creditors; it was unable to obtain upon its own credit the coal and other supplies necessary to keep its fleet of vessels at sea. Desiring to avert the loss incident to a complete cessation of operations, it applied to the Petitioner for coal, offering to give its note for the purchase price secured by bonds issued under its above mentioned mortgage to the Astor Trust Company. Inasmuch, however, as the Petitioner already held certain collateral notes of the Oil Corporation which were overdue and unpaid, it rejected the Oil Corporation's proposal and thereupon the Oil Corporation suggested to Mr. Bohannon, the Petitioner's Manager of Sales, that the coal be furnished upon the credit of its vessels.

In this connection we quote the following from the testimony of Mr. Thomas C. Meadows, Vice President and General Manager of the Oil Corporation:

> "Q. 15. Did Mr. Bohannon call on you any time during February, 1914, in an attempt either to collect this balance or make some working arrangements with you in regard to it?

Ans. He called regarding his account. I endeavored to make an arrangement with him for coal for the succeeding season.

Q. 16. Did you take up the question of coal for the season of 1914?

Ans. I did.

Q. 17. What did you offer him with regard to that coal, in your first proposition?

Ans. I told him that the company still had some of the bonds in its treasury such as had been pledged to secure his previous year's account, and on purchases for the year 1914 if he would be satisfied with those bonds as collateral we could give them as security.

Q. 18. What was Mr. Bohannon's reply to you? Did he have to refer back to some one?

Ans. He said he would refer it to Mr. Brophy, the president of the Company.

Q. 19. Did you afterwards see Mr. Bohannon?

Ans. Yes. Mr. Bohannon returned some two weeks later, I think, and reported Mr. Brophy was not willing to make a contract based on the bonds as the only security.

Q. 20. What further transpired?

Ans. I told him, as I understood the law, that we had a perfect right to use the credit of the steamers in the acquisition of coal and if he would be willing to furnish coal we would be perfectly willing that he hold and maintain a maritime lien on the steamers.

Q. 21. Was that of the entire fleet?

Ans. Yes; on all the boats.

Q. 22. Well, what happened thereafter?

Ans. He referred that to Mr. Brophy and Mr. Brophy accepted the proposition on that basis.

Q. 23. That was a maritime lien on your entire fleet should be security on which he was to furnish coal?

Ans. Yes.

Q. 24. That was your understanding of it?

Ans. That was my understanding of it".

Pursuant to the above arrangement and in reliance upon the Act of Congress, the Petitioner delivered to the Oil Corporation, primarily if not exclusively, for the use of its 17 fishing vessels then in service and in order to enable it to keep its said vessels afloat 5320 tons of coal of the agreed value of $17,854.27.

The coal was shipped at the expense of the Petitioner by rail to railway terminal points at St. George, Staten Island and Port Reading, New Jersey, where it was placed by the rail carrier upon barges belonging to the Oil Corporation. These barges were floated to Tiverton, Rhode Island, and Promised Land, New York, where the coal was dumped in the bins for distribution among the vessels of the Oil Corporation's fleet arriving from time to time to take on supplies. The petitioner did not control or direct the distribution of the coal, but merely undertook to replenish the bins at Tiverton and Promised Land on orders sent to it from time to time by the Oil Corporation, leaving the distribution of the coal to the agency of the Oil Corporation, itself. Thus under date of June 16, 1914, the Oil Corporation writes to the petitioner as follows:

"We are just advised by our Tiverton plant that their supply of coal has been pretty well exhausted in starting the boats out and that they can use another cargo of about 700 tons whenever it

suits your convenience to ship it to them. You may therefore consider this as an order for such a cargo when it is convenient for you to make the delivery".

Certain of the coal was used by vessels which the petitioner was unable to serve with process and a relatively small amount was used in the Oil Corporation's boilers at Promised Land and Tiverton and as to that coal, it is conceded that the petitioner either lost or failed to perfect its maritime lien; but the balance of the coal was duly distributed among and actually used by libelled vessels as follows:

Name of Vessel	*Tons*	*Contract Price*
Walter Adams	121.25	$408.16
Alaska	417.25	1421.81
Arizona	35.00	114.80
George Curtiss	229.50	769.92
Montauk	177.50	608.76
Quickstep	19.00	62.32
Ranger	337.50	1146.72
Herbert M. Edwards	429.00	1390.72
Roland E. Mason	452.00	1554.47
William B. Murray	406.75	1389.95
Martin J. Marran	292.75	979.84
Amagansett	492.00	1613.75
Total	3509.50	$11461.22

The District Court sustained the libels against the above mentioned vessels and awarded decrees for the value of the coal delivered to and used by each of them, the several decrees with interest and costs amounting as of November 1st, 1917 to $14,134.43.

(c) *Explanation of proceedings in the District Court.*

The invoices of the petitioner for the coal sold and delivered as aforesaid were not paid when they fell due, whereupon Mr. Brophy, representing the petitioner, came to New York for the purpose of enforcing collection by proceedings against the Oil Corporation's vessels. He called to see Mr. Meadows, Vice President of the Oil Corporation who persuaded him to delay action and the matter was held in abeyance until it became apparent that the Oil Corporation would pass into receivership. Mr. Brophy then again conferred with Mr. Meadows "who prevailed upon him to exclude from his action he was threatening to bring as many of the boats as he was willing to exclude so that we (the Oil Corporation) might have something to operate with even though he tied up part of the fleet."

Both Mr. Meadows and Mr. Brophy were obviously of the opinion that the petitioner held a joint and several lien against all vessels of the fleet and at Mr. Meadow's solicitation Mr. Brophy without waiving or intending to waive any lien or claim against the other vessels "selected the 5 best boats as ample security for his claim" and the amount due for the 5 cargoes of coal was apportioned on the records of the Oil Corporation among the 5 selected vessels arbitrarily and without regard to the amount of coal actually furnished to each vessel. Mr. Meadows testified on this point as follows:

> "Q. 46. What was done in regard to making a record of the selection of these five boats as the boats against which the liens were to be impressed?
>
> Ans. There was letters exchanged in which we

specifically recognize our obligation and our agreement with these gentlemen that prior liens did exist, and those were selected as five boats that the liens should be enforced against if he saw fit to bring action, and in that letter there was some approximate statement as to the total amount of other liens that existed against these five boats.

Mr. Woolsey: Have you got the letter of September 11, our original letter, to the Atlantic Phosphate & Oil Company?

Mr. Thornley: Yes, sir.

Mr. Woolsey: May I have that? I will give you a copy in return. And there are also one or two other letters, Mr. Thornley—the letter of June 26th, the letter of July 15th.

Q. 47. Had you seen Mr. Brophy at New York prior to his writing you the letter in September, that you speak of?

Ans. Yes; I think he had been there.

Q. 48. Well, had there been any record made on your books as to the boats to be chargeable for these liens, the boats against which the liens were to be impressed?

Ans. There had been no singling out of vessels, nothing except the entire fleet had been referred to prior to his visit.

Q. 49. Then, what was done in regard to making a record as to these five boats against which the proceedings were to be enforced?

Ans. Well, following his conference it was agreed that he should have his invoices billed, one invoice against one of the five new boats which we recognized as the best boats.

Q. 50. Will you tell the Judge what happened, how this was done?

Ans. Mr. Bohannon came to the office with the invoices made out as Mr. Brophy and I had agreed they should be made out.

Q. 51. In the same proportion as contained in these libels?

Ans. Yes; just as they are in the libels. When we came to substitute them for the existing invoices which had already been rendered we found on the existing invoices the bookkeeper's notations, the stamps with the "O. K." with the different initials on them, and we realized that an effort would have to be made to reproduce those, but instead of doing that the bill heads were simply torn out and pasted to the original invoices.

Q. 52. Do you remember the date of this?

Ans. I think it was either the early part of September or the end of August".

In October 1914 receivers were appointed for the Oil Corporation and some months later the petitioner filed intervening libels against five of the Oil Corporation's vessels, each of the libels containing two counts:

(1) A count for the value of the coal allocated to the vessel on the books of the Oil Corporation and

(2) A count for the value of the coal actually furnished to and used by the libelled vessel.

During the progress of the trial the District Court expressed a doubt as to the feasibility of holding any one of the five vessels liable for coal not actually used by it, but used by other vessels of the fleet and thereupon the petitioner libelled seven other vessels of the fleet which were the only vessels then within reach of process.

All of the twelve libels were consolidated and proof was taken establishing with mathematical certainty the amount of coal actually furnished to each one of the twelve libelled vessels.

(d) *Decision of the Lower Courts.*

On proof of the amount of coal furnished to and used by each of the libelled vessels the District Court found no difficulty in sustaining each libel to the extent of the value of the coal so furnished. We quote the following from Judge Brown's opinion:

> "I find, therefore, that in contracting for this coal it was understood by both parties that it was to be principally used for strictly maritime purposes, that a large part of it was used for such purposes, and that the parties contracted in view of statutory rights to a lien.
>
> "It may be argued that when coal is delivered to bins on the wharf of a purchaser, who may use it as he pleases, on such of his ships as he may select, or upon land, if he prefers, that the coal is furnished to the owner and not to a vessel. But such an argument upon the evidence in this case ignores the material fact that it was understood by both parties that the coal was procured and supplied largely for uses which were strictly maritime.
>
> "Doubtless a very substantial part of the inducement to the Coal Company to supply the coal was its knowledge of its intended use by vessels for maritime purposes, and its understanding that the law gave it a lien for coal supplied for such purposes. Upon the facts in this case it is most im-

probable that the coal would have been supplied to the owner and upon the owner's very doubtful credit.

"I find that it was furnished because it was destined and intended to be used in large part by vessels, and that in the sense of the statute it was therefore furnished to vessels upon the faith of a lien thereon, and not to the owner.

"The ultimate destination to vessels, and the use by vessels, being a material consideration, contemplated by both parties, it would be most unjust to the libelant to hold that it furnished the coal to the owner, and only on the owner's credit. The mere fact that the names of the particular vessels to receive particular shipments of coal were unknown I cannot regard as material. The Oil Corporation was known to be the owner of a fleet of vessels, and it was known that these vessels would call from time to time at the Oil Corporation's wharves for their coal. That is sufficiently certain which, in the due course of the contemplated supply of coal to the fleet would be made certain.

"The subsequent appropriation of the coal to particular vessels by the owner, being in pursuance of what was intended by both parties, logically relates to the question whether the coal was furnished by the libelant to a vessel. The course of the business of the owner's fishing fleet selected and made certain which of the vessels should receive the benefit of the libelant's coal and become subject to a maritime lien corresponding to the benefit received. A contract to provide coal for such vessel of a fleet as might first arrive in port, and the delivery of coal ready at the owner's wharf for such vessel would become definite on the arrival of the first vessel of the fleet.

"As supplies for fleets of vessels under a common ownership and management in the ordinary course of business are contracted for in view of the general requirements of the entire fleet, as supply men will thus be called upon to furnish supplies in advance of the arrival of the vessels, as at the time supplies are ordered there may be uncertainty as to which vessel may require them and use them, the statute should receive a construction which will make it applicable to and consistent with modern business conditions. A supply man who furnished supplies ready for any vessel of a fleet that may call for it should not be deprived of the same right to a lien as a supply man who is told the name of the vessel which is to require the supplies.

"The appropriation of the coal to a particular vessel, though made by the owner, yet if done in pursuance of the course of business contemplated by the parties, must be regarded as completing a "furnishing" by the libelant to "a vessel," which is identified by the act of the owner in placing the coal aboard.

"Cases which hold that supplies may be furnished to a vessel, though not actually incorporated in or used by the vessel, have no bearing in this case. While use and appropriation may not, in all cases, be necessary to make out a case of furnishing to a vessel, it does not follow that they may not afford conclusive evidence of the identity of a vessel and of the completion of a maritime lien thereon.

"But the question of the effect of an appropriation to a particular vessel I regard as settled by the decisions of Mr. Justice Curtis and Judge Putnam, heretofore cited. In these cases it was at

the outset uncertain which of two vessels might receive the supplies. In the present case it was uncertain which vessels of a fleet might receive them, but in this case, as in the cases cited, the uncertainty ended upon the owner's appropriation of the coal to special vessels.

"Following the decisions of Justice Curtis in *The Kiersage*, 2 Curt. 421, Fed. Cas. No. 7762, and of Judge Putnam in Berwind-White Coal Mining Co. *v.* Metropolitan S. S. Co. (C. C.), 166 Fed. 784, I am of the opinion that for such coal as actually went into any vessels of the fleet the libelant is entitled to a maritime lien upon such vessel, but that there can be no lien upon one vessel for coal supplied to another vessel. See, also, *The Yankee*, 233 Fed. 917, 927."

The Circuit Court of Appeals reversed the decrees of the District Court because it felt obliged on historical grounds deemed of importance to restrict and contract the application of the Act of Congress and limit it to cases where the name of the vessel to which supplies are furnished and the extent of the supplies are known and specified in advance.

We quote the following from the opinion written by Judge Dodge:

"Assuming that the libelant can be said, in the case of any one the vessels, to have "furnished to" her the coal she received, in the statutory sense, the furnishing may be said to have been "upon the order of her owner." But the question is, whether any such assumption can be made, in view of the facts that after turning over to the owner of the fleet the entire quantity of coal

shipped as above, the libelant left it wholly to the owner to select, out of the fleet, the particular vessels by which the coal was to be received and used, and to determine the particular part of said quantity to be put on board each vessel, as well as the particular time for putting it on board.

"The Federal statute enlarged the maritime law as it had previously stood, by permitting the acquirement of maritime liens upon vessels, for supplies furnished to them, as well in their home ports as in foreign ports. This it accomplished by providing that proof of furnishing such supplies to a vessel should be sufficient proof of credit given to the vessel therefor,—definite proof of credit so given having always previously been held necessary, whenever what had been furnished had been furnished at the port of the owner's residence. We see no reason to believe that the statute intends the same result to be accomplished without proof that the supplies for which a lien is claimed have been furnished directly to the vessel, and not merely furnished to the owner without definite and distinct reference to her."

These two quotations indicate the point where the views of Judge Brown and Judge Dodge diverge.

The petitioner is to be deprived of its lien and its decrees undermined for the benefit of the purchaser of the vessels at foreclosure sale, which purchaser acquired the vessels with full knowledge of the facts, all for the reason that the petitioner did not do the impossible and indicate in advance of the delivery of the coal at the Oil Corporation's bins the name of each vessel to be supplied with coal and the amount to be appropriated for each vessel.

Our position is that such a construction so narrows and contracts the Act of Congress that it is wholly unavailable to Corporations operating fleets of vessels and that the question is one of general public importance, especially under prevailing war conditions when (a) the utmost secrecy is required to be preserved with respect to the movements of ocean going vessels and (b) the maintenance of the nation's coal supply requires the maximum utilization of storage facilities at points of consumption.

I. *The authorities sustain the libelant-petitioner's claim for liens against each vessel to the extent of the coal used by it under the circumstances of this case.*

The act of June 23, 1910, affords a maritime lien for supplies furnished to a vessel and where coal is delivered to the insolvent owner of a fleet of vessels for distribution among the vessels of the fleet, and it is expressly stipulated that the delivery is made upon the credit of the vessels and not upon the credit of the owner, a lien attaches to each vessel for the value of the coal actually distributed to and used by it. The decision of the Circuit Court of Appeals denying such a lien and contracting the scope of the act of Congress is erroneous.

The Act of Congress of June 23, 1910 (36 Stat. 604, chapter 373) printed in full in the margin below provides that,

> (§1) "Any person furnishing * * * supplies * * * to a vessel, whether foreign or domestic upon the order of the owner or owners of such vessel * * * shall have a maritime

> lien on the vessel which may be enforced by a proceeding *in rem* and it shall not be necessary to prove that credit was given to the vessel."

In the case at bar the Oil Corporation, the bankrupt owner of a fleet of 19 steam fishing vessels ordered from the petitioner for the purpose of keeping its fleet afloat five cargoes of coal, valued at $17,854.27. By the express terms of the Act of Congress there is a presumption that the coal so furnished to the vessels was furnished upon the credit of the vessels and not upon the credit of the owner, but the petitioner did not rest upon any mere statutory presumption—it refused to deliver any coal on the credit of the owner, declined to accept the owner's proposal that it accept its note secured by mortgage bonds as collateral and finally consented to deliver the coal solely upon the credit of the 17 vessels of the fleet then in service and under an express agreement that it should have a maritime lien therefor.

The Circuit Court of Appeals has held, however, that *notwithstanding the statutory presumption and the express agreement and stipulation of the parties* no maritime lien attached under the Act of Congress for the reason—and we again quote directly from the opinion of Judge Dodge—that:

> "After turning over to the owner of the fleet the entire quantity of coal shipped as above, the libelant left it wholly to the owner to select out of the fleet the particular vessels by which the coal was to be received and used, and to determine the particular part of said quantity to be put on board each such vessel as well as the particular time for putting it on board."

Reduced to a simple analysis the decision of the Circuit Court of Appeals denies a maritime lien to a supply man who furnishes the supply through the agency of the owner of the vessel. We submit that such a construction of the Act of Congress is not only unreasonable and untenable, but is contrary to the best considered authorities.

In *Berwind-White Coal Mining Co.* v. *Metropolitan SS. Co.*, 1908, 166 Fed. 782, affirmed by this Court 173 Fed. 471, an intervening petition was filed seeking to have liquidated and allowed certain claims for work and material furnished on two steamers as a part of their original construction, and Judge Putnam held that where a joint contract provided that payments should be made to the contractor for labor and materials furnished for the construction of several vessels, under the statutes of New Jersey there was no inherent difficulty in determining the amount to be paid for labor and materials which went into each vessel, nor in apportioning the lien accordingly.

Judge Putnam further held that it was not essential to the validity of a lien given by a state statute on a vessel for labor or material furnished in its construction that the same should have been furnished on the credit of the vessel, where the statute does not in terms require it.

He said at page 784:

> *"The underlying equity is that the lien is supported by the fact that the labor and materials have actually gone into the property on which the lien is claimed, and increased its value."*

In *The Kiersage*, 1855, 2 Curtis 421, 14 Fed. Cas. 466, it was held that a law of Maine similar in purport to the Lien Act did not give to material men a lien on one vessel for supplies and materials furnished both for it and for another vessel though both were of the same size and model, but that the lien was only for such supplies as are used in the vessel proceeded against.

Mr. Justice Curtis, who delivered the opinion of the Circuit Court, used the following language, at page 467, and as Judge Brown remarked in his opinion below, it "seems to be directly applicable to the case before us":

> "At the same time, I think that where materials are furnished for two specific vessels, though the original contract does not appropriate them specifically to either, yet when they are afterwards appropriated, they may properly be considered as furnished for that vessel, in the construction of which they are used. The effect of such a contract is to enable the builder to elect, to which of the two vessels he will appropriate them. When he has made that election and actually appropriated them or some part of them to one vessel, I can see no sound reason, why it may not be said with truth, that they were furnished for and on account of that vessel, and so, that the case is within the terms of the law."

The case of *The Kiersage* has been cited with approval in two recent cases.

In *The Yankee*, 1916, 233 Fed. 919, decided by the Circuit Court of Appeals for the Third Circuit, the dredge *Yankee*, chartered to a dredging company, was being used by it in dredging in the Delaware river below

Philadelphia. The libelants furnished supplies on orders of the dredging company, which specified that they were for its fleet of vessels including the dredge *Yankee* and contained shipping directions pursuant to which the supplies were forwarded by rail and other carriers to a designated wharf in Philadelphia, from which they were taken from time to time by the dredging company to the dredge where it was at work. It was held that such supplies were "furnished * * * to a vessel", within the meaning of the Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (Comp. St. 1913), relating to maritime liens, and that under that act one furnishing supplies for a vessel on proof of an order therefor from the owner or from a person to whom the management of the vessel has been lawfully intrusted at the port of supply, and of the fact that the supplies reached the vessel, has the right to a maritime lien on her.

Circuit Judge Woolley, delivering the opinion of the court, said at page 927:

> "With respect to the claim of the last named libellant, which grew out of a contract to supply coal for the whole fleet, we are satisfied that in giving the order, the quantity to be supplied to and daily consumed by the *Yankee*, was mentioned and considered by the parties, and that of the total amount of coal supplied, a definite portion was appropriated for and furnished to the *Yankee* within the rule of law applicable in such cases. *The Kiersage*, Fed. Cas. No. 7762; *The Murphy Tugs* (D. C.) 28 Fed. 429; *McRae* v. *Bowers Dredging Co.*, (C. C.) 86 Fed. 344."

In *The Cora P. White*, 1917, 243 Fed. 246, which was

a libel against a fishing vessel, one of the libelants claimed a maritime lien for coal furnished to the vessel. While the District Court decided that no maritime lien existed for the coal furnished, the sole reason for that decision was that the coal was furnished to the owner company without mention that the coal was intended for use on a vessel. District Judge Rellstab said at page 249:

> "The act of June 23, 1910, extended said lien to domestic vessels, and made it unnecessary to allege or prove that credit for the supplies, etc., was given to it, but it did not obviate the necessity to allege and prove that said supplies were in fact furnished to the vessel. This does not mean that the materialman must personally see that the goods are actually put on the vessel. If the supplies are furnished on the orders of the person to whom its management has been lawfully intrusted at the port of supply, and which pursuant to the orders of such person were forwarded in the manner indicated to a designated place, from which they were taken by such person to the vessel where it was at work, such supplies are furnished to it within the meaning of the act of 1910. *The Yankee* (C. C. A. 3) 233 Fed. 919, 147 C. C. A. 593.
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> "Nor did this act change the law that a lien does not exist when the supplies are furnished on the mere credit of the owner. *Ely* v. *Murray & Tregurtha Co.* (C. C. A. 1) 200 Fed. 369, 118 C. C. A. 520. The agreement or understanding as to whether credit was given to the vessel, or the owner alone, may be inferred from acts and circumstances as well as from express language. *Cuddy* v. *Clement* (C. C. A. 1) 115 Fed. 301, 53 C. C. A. 94; *The Lucille* (D. C.) 208 Fed. 424.

"No case has been cited, and none has been found, where a maritime lien has been allowed, where the supplies were furnished on the order of the owner, which did not indicate that they were for a vessel's use, because the goods or some of them were subsequently used on said vessel. There are cases which sustain such a lien where the goods or services were ordered for several vessels, and all of the goods or labor were actually furnished or rendered to said vessels. *The Kiersage*, Fed. Cas. No. 7,762; *The Murphy Tugs* (D. C.) 28 Fed. 429; *McRae* v. *Bowers Dredging Co.* (C. C.) 86 Fed. 344; *The Yankee* (Claim of the Glen Brook Coal Co.), *supra*. In these cases the value of the supplies and services was proportioned and liens allowed on said vessels respectively."

The principles applied by Judge Arthur Brown in the present case were also applied in two often-quoted cases, *The Murphy Tugs*, 28 Fed. 429, and *McRae* v. *Bowers Dredging Co.*, 186 Fed. 344.

In *The Murphy Tugs*, 1886, 28 Fed. 429, the libellant made a contract with the president of the tug boat company to serve as a diver and engineer and was to be paid at the rate of $10 a day and to work on any vessels of the company as ordered. In dealing with this and sustaining the liens, Mr. Justice Brown, then District Judge in Michigan, said at page 430 [italics ours]:

"The difficulty in this case arises from the fact that the contract between the libellant and the Tug and Transit Company was not for services upon any particular tug, but for services upon any tug owned by the company to which he might be ordered. I doubt if this circumstance varies in

any way the principle applicable to this class of cases if his services are paid by the day, and *are therefore capable of apportionment.* While the services may not be actually rendered upon the tug, he is for the time being a part of the equipment of such tug, and entitled to a lien upon her, upon the principle announced by this court in the case of *The Minna*, 11 Fed. 759, in which I had occasion to hold that all hands employed upon a vessel, except the master were entitled to a lien, if their services were in furtherance of the main object of the enterprise in which she was engaged. In this case a lien was sustained in favor of persons employed upon a fishing tug, solely for the purpose of catching and preserving fish, notwithstanding the fact that they took no part in the navigation of the vessel, and that an incidental portion of their duties was performed on shore.

"To deny the libelant a remedy by lien is virtually turning him over to a personal claim against an insolvent corporation. While the case is a somewhat doubtful one, I am inclined to allow the claim."

McRae v. *Bowers Dredging Co.*, 1898, 86 Fed. 344, which cited *The Murphy Tugs* at page 347, was an equity case in which the defendant was an insolvent corporation whose property was in the hands of a receiver. The intervening creditor in question had furnished necessary supplies and materials for repairs to defendant's vessels and machinery. Among the supplies furnished was coal consumed by two vessels, which was furnished upon the request of the general manager. This coal was necessary to enable the defendant's dredgers to work.

The evidence showed that the general manager did not have money to pay for or means to procure this coal otherwise than upon the credit of the dredgers. The court held that this evidence was sufficient together with evidence that it was furnished at the manager's request in scows, from which it was received on board the dredgers as required for use, to raise a conclusive presumption of necessity for using the credit of the vessels and the creation of maritime liens, citing *The Grapeshot*, 9 Wall, 129-145; and *The Lulu*, 10 Wall, 192, 204. The court further held that where persons were employed on and coal furnished to two or more vessels and the evidence shows the time which each man devoted to the service of each vessel and the amount of coal used on each, the amounts will be fairly apportioned between the vessels and as a court of equity it enforced preferential claims based entirely on maritime liens against the estate.

The Court said at page 348 [italics ours]:

> "All of the coal consumed by both vessels while engaged in the work was purchased of the intervenor C. J. Smith, as receiver of the Oregon Improvement Company. The evidence shows that the defendant is a corporation organized under the laws of the State of Illinois. Its president and general officers, except a general manager, were not inhabitants of this state, and it had no general office in this state while the work referred to was being done. The coal was furnished upon the request of the general manager, and was delivered in scows, from which it was received on board the dredges as required for use. *The evidence shows the average daily consumption of*

each of the dredges, and the number of hours each was in operation; and from this data a close estimate of the amount supplied to each can be ascertained, and a fair apportionment made, so that the liens upon each vessel will not be for a greater amount than the price of the coal which she consumed.''

While it is true that certain of the above decisions were rendered under state statutes we fail to perceive any substantial basis for distinguishing them or questioning their authority.

Especial reliance is placed upon the decision in *The Kiersage*, 2 Curtis 421.

The Maine statute there involved allowed a lien for supplies *''furnished to or for account of a vessel.''* A quantity of supplies were delivered to the owner of two vessels who was permitted by the supply man to apportion them among the two vessels—in the language of Judge Dodge, in the present case it was left to the owner ''to determine the particular part of said quantity to be put on each vessel as well as the particular time for putting it on board.''

Justice Curtis however upheld the lien in *The Kiersage* on the express ground that the several quantities apportioned to each vessel by the owner were ''furnished to'' the vessel by the supply man. This is precisely the language used in the Act of Congress of June 23, 1910 which is under consideration here.

Furthermore, the equity of the case is wholly in the coal company's favor. For supplies furnished to keep an insolvent concern running, preferences over a mort-

gage are always granted by courts of equity even when the question of maritime liens is not involved, for the establishment of liens for supplies furnished does not depend altogether upon statute law. The courts have held in many cases of receiverships that one who furnishes supplies necessary, for example, to the operation of a railroad as a continuing business, has the right to preferential payment from surplus earnings in the hands of the receiver subsequently appointed, and that bondholders cannot claim priority for their mortgage. *Va. & Ala. Coal Co.* v. *Central R. R.*, 1897, 170 U. S. 355; *Miltonberger* v. *Logansport Ry. Co.*, 106 U. S. 286, 311, 312; *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434; *Thomas* v. *Western Car Co.*, 149 U. S., 95, 110; *Southern Ry.* v. *Carnegie Steel Co.*, 76 Fed., 492; 176 U. S., 257; *Manhattan Trust Co.* v. *Sioux etc. Co.*, 76 Fed. 658; *Bellingham Bay etc. Co.* v. *Fairhaven etc. Co.*, 17 Wash., 371; *Farmers Loan & Trust Co.* v. *American Water Works Co.*, 107 Fed., 23; *N. Y. Guar. & Indem. Co.* v. *Tacoma etc.*, 83 Fed. 365.

Nor is the rule limited to railway receiverships: *Reinhart* v. *Augusta M. & T. Co.*, 94 Fed., 901.

II. *The Lien Act was intended to broaden and increase the security of persons furnishing supplies to vessels, not to narrow or circumscribe it, and hence should have an enlightened construction to meet modern needs.*

In *The Oceana*, 1917, 244 Fed. 80, which was a consolidated libel to enforce maritime liens against *The*

Oceana, the main question was that of notice. It was held that all persons furnishing supplies, whether before or after formal delivery of a vessel from the ship repairer, without knowledge or notice of the contract of sale, were entitled to liens therefor. Judge Ward who delivered the opinion of the Court, discussed the nature and purpose of the Lien Act, and showed that its purpose was to increase not to limit the material man's security by way of lien. He said at page 82:

> "Obviously the act was passed in restriction of the rights of vessel owners and in the aid of those who furnish repairs, supplies, and other necessaries. It wiped out all difference between foreign and domestic vessels, and between repairs, supplies, and other necessaries furnished in the home port, as distinguished from those furnished in foreign ports, and between such as were ordered by the master and such as were ordered by the owners. It created a presumption of law of the vessel's liability for all repairs, supplies, and other necessaries ordered by the master, managing owner, ship's husband, charterer, any person to whom the management of the vessel is intrusted at the port of supply, owner pro hac vice, and conditional vendee."

III. *It is not necessary in order to impress a lien that the supplies be actually delivered on board the vessel by the person who supplies them.*

If supplies are brought within the immediate presence or control of a ship, the vessel, of course, is bound. *Ammon* v. *The Vigilancia*, 1893, 58 Fed. 698.

In *D. & H. Canal Co.* v. *The Alida*, 1857, 23 Betts D. C. Mss. 139, 7 Fed. Cas. 399, which was a libel for fuel furnished, District Judge Betts, in giving a decree for the libelant, held that a lien on a steamer for fuel arises upon a delivery thereof on a wharf nearby in pursuance of the orders of her officers.

In *The James H. Prentice*, 1888, 30 Fed. 277, Sanborn, sole owner of a barge, contracted with one Beaudry to repair and improve her. While the work was going on he agreed to sell a half interest in her to Kelly, and further authorized Kelly to superintend the work and to settle the bills therefor. He subsequently conveyed to him his half interest. Libelants, knowing nothing of the contract with Beaudry and Kelly, and supposing Kelly to be a part owner, furnished lumber to the contractor Beaudry, which Kelly inspected and promised to pay for. It was held that Sanborn had so conducted himself as to lead libellants to believe that Kelly was authorized to bind the vessel, and that they had a lien for the amount of their bill.

It was further held that under a statute giving a lien for material furnished in and about the building and repairing of water craft, it is sufficient to show that the materials were ordered for and delivered to or near the vessel though it appeared that a part of them were subsequently used for other vessels, and that the act did not require proof that the materials were actually incorporated in the vessel sought to be charged.

IV. *It is settled law that an owner may by agreement, express or implied, create a lien on his vessel for supplies furnished.*

In *The Kalorama*, 1869, 10 Wall. 208, which was a libel for advances ordered by the owner for repairs and supplies to the steamer, the District Court held that the advances were a lien upon the steamer. The Circuit Court held that they were the mere personal debt of the owner. The Supreme Court affirmed the decree of the District Court.

Mr. Justice Clifford said at page 214:

> "Implied liens it is said can be created only by the master, but if it is meant by that proposition that the owner or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the Court cannot assent to the proposition as the practice is constantly otherwise."

In *The Cimbria*, 1914, 214 Fed. 128, it was held that under Act June 23, 1910, one advancing money to pay claims for repairs, supplies, etc., furnished to a vessel, is presumed to have made the advances on the credit of the vessel, and such presumption is not overcome by his taking the owner's note and a mortgage on the vessel.

In *The Alaskan*, 1915, 227 Fed. 594 (C. C. A. 9th Circuit), it was held that under the Washington State Code §1182 which gives a lien on a vessel for repairs made at the request of the owner, agent, etc., conceding that there must be some evidence that the repairs were furnished on the credit of the vessel, such evidence need

only be slight; and the uncontradicted evidence of the repairer that he relied on the credit of the vessel, and that he had previously made repairs for the same owner, charged the same to the vessel direct, and rendered the bills to the owner, is sufficient.

In *The George Dumois*, 1895, 68 Fed. 926 (C. C. A. 5th Circuit), coal was furnished by libelant at Mobile, Ala., to the ship G. upon the personal order of one D., the president of the C. Company, the charterer of the ship. The C. Company was a Louisiana corporation and D. a resident of New Orleans, neither appearing to have had any property at Mobile. The ship was not in a port of distress, but was running regularly between Mobile and foreign ports. No reference was made to the vessel as a source of credit when the coal was ordered, but it was received by the master and used in prosecuting a voyage which could not have been made without it, and it was charged on libelant's books to the ship. It was held that libelant had a lien on the ship for the price of the coal.

The Court in *The George Dumois*, further held that where necessary supplies are furnished to a ship in a foreign port, and are received by the master and used in the service of the ship, a maritime lien results, unless it is shown that the furnisher of the supplies relied on the credit of the owner, not of the ship; and the burden of showing such fact, to defeat the lien, rests on the ship and her claimants.

In *The Fortuna*, 1914, 213 Fed. 284, it was held that articles furnished on the order of the master and repre-

sentative of the owner to supply the slop chest of a vessel about to sail on a season's fishing trip of four or five months' duration, are "supplies or other necessaries" within the meaning of the Act of June 23, 1910, c. 373, §1, 36 Stat. 604, for which such section gives a lien on the vessel.

The recent decision of the Circuit Court of Appeals for the Ninth Circuit in *The South Coast*, 247 Fed. 84, indicates the strength of the presumption that supplies are furnished on the vessel's credit.

In that case there was a charter of a ship with option to purchase and the owner reserved only the right to appoint the master who was to be paid by and be under the orders of the charterer. It was provided that the owner might reject the vessel on failure of the charterer to pay the charter hire or to discharge any liens within thirty days after they accrued, and that the charterer should hold the owner harmless from all liens or demands against the vessel created during the charter term.

It was held that the provision for this indemnity did not negative the authority of the charterer to procure supplies on the credit of the vessel, but, on the contrary, rather implied such authority, and that anyone who, in good faith, furnished the necessary supplies on the master's ord on the credit of the vessel was entitled to a lien therefor, although the owner had notified him not to furnish the supplies.

In a very interesting opinion, Judge Wolverton points out that the owner's attempt to prevent the libelant from advancing supplies on the credit of the vessel was really

an invasion of the charterer's rights under the charter and was unavailable to subvert the master's authority in the premises.

Judge Wolverton said at page 88:

> "Now, coming to the instant controversy: The repairs and supplies in question were furnished on the order of the master. The master, who was appointed by the owner, was obliged, under the charter party, to take his directions from the charterer. The libelant was apprised of the existence of the charter party, and was warned by the owner not to furnish supplies on the ship's credit. The libelant, nevertheless, furnished the supplies, with the declaration to the owner's representative that he would not furnish them in any other way, or under any other conditions, than upon the credit of the ship.
>
> "It is the purpose of the statute, as it was the purpose of the law previous thereto, that the furnisher of such commodities as are necessary to enable a ship to enter upon or pursue her voyage, and to engage in maritime traffic, to which only she is adapted, shall have a lien on the ship therefor. It is in the interest of shipping, conducted upon maritime waters, that such should be the case, as otherwise credit would not be extended, upon the account of the owner or master alone, to enable the ship to discharge its peculiar function, and great inconvenience would follow, to the detriment and disadvantage, if not the ultimate disaster, in large measure, of maritime shipping. Many ships sail under charter, either verbal or in form of regularly drawn charter parties, and it is usual and customary for the charterer in either event to disburse the necessary expenses of the

ship; and of this all persons furnishing supplies, etc., to a chartered ship must be deemed to have notice. But notwithstanding this notice, or even knowledge that the ship is under charter, we cannot believe that it was the intendment of the statute or of the law that the furnisher should, because of that fact, be deprived of his lien when advancing necessary repairs or supplies in good faith to enable the ship to engage in her accustomed traffic. Nor do we believe that it was the intendment of the statute or of the law thus to impose so vital a hindrance upon maritime shipping, and unless there is something more in the charter party, that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon, the master's ordinary authority is not impaired or abbreviated; nor can the right of the furnisher of repairs, etc., to extend credit to the ship, and his consequent lien, be so subverted.

"The terms of the present charter party as respects the furnishing of repairs, supplies, etc., are only those usual to most charter parties, and by reason of the provision that the charterer will hold the owner harmless from all liens against the vessel, there is an implication of authority on the part of the charterer to incur such expenses on the credit of the vessel. True it is that the owner attempted to prevent the libelant from advancing the supplies on the credit of the vessel; but this was an invasion of the charterer's rights under the charter party, and was unavailing to subvert the master's authority in the premises. As bearing upon the proposition, in addition to *The Surprise, supra*, see *The Philadelphia*, 75 Fed. 684, 21 C. C. A. 501."

Even though this Court should find that there was no express agreement to furnish coal for specific ships the circumstances are such that this Court should imply an agreement to create a lien on the particular ships which actually used the coal for the coal used by each. *The Grapeshot*, 1869, 9 *Wall.* 129; *The Ella*, 1897, 84 Fed. 471, 477; *The Worthington*, 1904, 133 Fed. 725; *The Kalorama*, 1869, 10 Wall. 208; *The Emily Souder*, 1873, 17 Wall. 666; *The Valencia*, 1896, 165 U. S. 264, 271; *The Patapsco*, 1871, 13 Wall. 329, *The Havana*, 54 Fed. 201; *The Newport*, 1901, 107 Fed. 744; 114 Fed. 713.

V. *Agreements for a general lien such as was here shown have frequently had judicial approval.*

In *The Patapsco*, 1871, 13 Wall. 329, coal was ordered by the owners under a general contract for all their vessels. Part of the coal was delivered on board the *Patapsco* at a foreign port. The facts showed that the owners of the vessel did not have good credit and that the Coal Company was aware of this fact, and that the Coal Company looked to the vessels as security.

The court held that a maritime lien existed for the value of coal supplied, unless it was shown that the master had funds or the owners had credit. *It was also held that an entry in the ledger charging coal to owners was not sufficient to show that credit was given owners personally.*

Mr. Justice Davis delivered the opinion of the Court and said at page 333:

> "It would be strange if the libellant did not know this condition of things and in the absence

> of proof on the subject, it is a reasonable inference that he did. If he had this knowledge it would be a violent presumption to suppose that he relied on the credit of the company at all for the supplies which he furnished."

To the same effect is the case of *Lower Coast Transportation Company* v. *Gulf Refining Co.*, 211 Fed. 336, decided by the Circuit Court of Appeals of the Fifth Circuit.

In the present case, there is clear proof of the libelant's knowledge of the Oil Corporation's shaky financial condition. As Judge Brown said in his opinion in the case at bar, at page 129 of the *record*:

> "It may be said, therefore, that the parties contracted knowing that a large portion of the coal was to be used for a strictly maritime purpose, and in reference to such legal rights as existed under the United States statute."

In *The Patapsco, ubi supra*, Mr. Justice Davis said at page 334:

> "If the credit was to the vessel there is a lien, and the burden of displacing it on the claimant. He must show, affirmatively, that the credit was given to the company to the exclusion of a credit to the vessel. This he seeks to do by the form of charge in the libelant's journal and ledger. If it be conceded that these entries tend to support this position, they are far from being conclusive evidence on the subject. Entries in books are always explainable, and the truth of the transaction can be shown independent of them."

In certain phases that case is square with the facts in the case at bar. Here the bookkeeper merely charged the shipments as they were made into the general running account of the Oil Corporation even though both he and the officers of the Coal Company knew that the coal was furnished on the credit of the steamers for which the coal was intended. The change in the method of charging the coal was made at the Oil Corporation's request and is not subject to any criticism by the successors in title to the Oil Corporation especially as it was made at the suggestion of the Oil Corporation.

In *The Freights of the Kate*, 1894, 63 Fed. 707, a steamship line obtained certain letters of credit from its bank, and as collateral security for the payment of the drafts drawn thereon, hypothecated to the bankers "all freights earned and to be earned." The freights referred to were the freights of all the several vessels of the line. The Court held that hypothecation of the freights created a general lien on the freights for all the voyages of all the boats and that such a maritime lien was properly created by agreement. The Court further held that freights of vessels B, C and D might be hypothecated to obtain supplies for vessel A. At page 712 Judge Addison Brown said:

> "I see nothing invalid in such a general hypothecation. The parties, in effect, treated the vessels run by the company as constituting a line, and dealt with the line and all the vessels running in it, as with a single vessel. See *The Rosenthal*, 57 Fed. 254. This was the undoubted intention. In the negotiations, no particular steamers were

named; the drafts were to disburse the company's steamers, *i. e.*, any or all of them, as might be needed. As between the parties there is surely nothing invalid in procuring necessary supplies for a line of vessels by an extended hypothecation of that kind. A master could not make such an extended hypothecation, because his authority extends only to his own vessel. But the owner is not thus limited. 'No one has ever questioned,' says Butler, J., in *The Mary Morgan*, 28 Fed. 199, 'that an express lien may exist whenever the owner chooses to create it.' The freights belonged to the steamship company; and in thus hypothecating them, they exercised no more than an owner's ordinary right. The extended hypothecation was adapted to the modern modes of business, and was not violative of any rule of the maritime or municipal law."

At page 713, Judge Addison Brown said:

"* * * maritime liens, resting wholly on express contract, have constantly been enforced. Such is the ordinary express contract of bottomry; the lien for supplies, under the English practice; the lien for charter hire upon the subfreights of a chartered vessel in possession of the charterer; the lien for supplies by material men, or for advances by the ship's agent, on dealings with the owner alone. *The James Guy*, 1 Ben. 112, Fed. Cas. No. 7,195; *Id.*, 5 Blatchf. 496, Fed. Cas. No. 7,196; *id.*, 9 Wall. 758; *The Kalorama*, 10 Wall. 214; *The Patapsco*, 13 Wall. 329; *The Stroma*, 3 C. C. A. 530, 53 Fed. 281, 283; *The Erastina*, 50 Fed. 126. See also *The Volunteer*, 1 Sumn. 551, Fed. Cas. No. 16,991; *The Kimball*, 3 Wall. 37, 44."

The Freights of the Kate, supra, stands specifically for the proposition that an hypothecation of freights earned and to be earned was a maritime contract and that it created a general lien on all freights of the steamship company, including those of vessels subsequently chartered, and that such a lien can be enforced in admiralty against the freights of vessels arriving after the failure of the company and further that this general lien was subordinate to any specific lien on the same freights for advances actually applied to assist the current voyage. In this case, as in the case at bar, there was a mortgage, but the Court said at page 714:

> "The only other party in the case who might complain of the general hypothecation, is the mortgagee; and under both the maritime, and the municipal law, I think the mortgagee's rights are inferior to this express hypothecation."

Again, the Court said at page 715:

> "The mortgagee and receiver contend that any such general lien as above stated is inferior to their claims. The ordinary rule, however, is that a mortgage of vessels is inferior in rank to subsequent maritime or statutory liens for supplies; because the former is a nonmaritime security, while the latter are in aid of the necessities of commerce and navigation. *The J. E. Rumbell,* 148 U. S. 1, 13 Sup. Ct. 498."

In *The Advance,* 1896, 72 Fed. 793, affirming 63 Fed. 726, the owners of vessels borrowed money in the home port to discharge liens on vessels at foreign ports and enable them to continue their voyages. The owners ex-

pressly hypothecated the freights to cover the drafts. The Court held that this express hypothecation created a general maritime lien on the freights alone and did not create a lien on the vessel itself. Circuit Judge Shipman, who delivered the opinion of the court, said at page 798:

> "* * * At the threshold of the inquiry, three facts are manifest: Firstly, an absolute necessity, recognized by each, and consequent upon the known insolvency of the steamship company, of a maritime lien of some sort; secondly, that a maritime lien was given, which the district court has found to be, at least, upon the freights,—a conclusion which has now become *res adjudicata*, and in which our examination of the case leads to a full concurrence; thirdly, and one of great importance, that whatever security was given was expressly given. The contract between the parties was an express contract, entered into between the owner of the vessels and Mr. Huntington. The antecedent circumstances are valuable for the purpose of throwing light upon the probabilities of the contract, and in the ascertainment of what one party would have naturally proffered and the other party would naturally have insisted upon; but whereas, in many cases, courts, in consequence of the silence of the parties when the advances were made, or their subsequent forgetfulness of what occurred, are compelled to look at the inferences to be drawn from their conduct and acts, in view of the known insolvency of the owner, little resort can be had in this case to that class of evidence. There is a class of cases, in regard to maritime liens for supplies furnished to a vessel in a foreign port at the request of the owners or of their agent (of which *The James Gray*, 1 Ben.

112, Fed. Cas. No. 7,195, and 9 Wall. 758, and *The Patapsco*, 13 Wall. 329, are examples), in which there was not apparently an express contract between the owners and the material men for the credit of the vessel, but in which the lienors' knowledge of the insolvency of the owner was regarded as a very significant fact, from which the inference could naturally be drawn that credit must have been given in part to the vessel. In this case a court is able to ascertain what the owner offered, and what the lienors apparently accepted, as security, at the time when the contract was entered into. The terms of the express contract, when they can be accurately ascertained, must preclude the idea of a contract to be ascertained by inference for another and different security from the one contained in the express contract. It is true that Huntington's knowledge of the utter insolvency of the steamship company is important to show that he naturally would have wanted to get all the security which was available, but, if the evidence shows that he did content himself with the security of the freights, his lien must rest where he placed it."

Astor Trust Co. v. *White*, 4th Cir. C. C. A., 1917, 241 Fed. 57, is mentioned by the appellant. The case seems to recognize the correctness of Judge Brown's decision in the case at bar, in view of the proof that the coal was used by the steamers. It apparently arose out of another phase of the same receivership as was involved in this case and which is a late case in the Circuit Court of Appeals dealing with maritime liens, and when their right to priority should be allowed. Certain supplies were needed for a fleet of four fishing vessels.

The charterers' credit was poor. The appellees agreed to furnish the supplies provided they were secured by a lien on the vessels. This was agreed to and notes aggregating $2,000 were given, which were endorsed with the names of all the vessels and the names of two men. It was agreed further that for additional supplies furnished the appellees should have a lien on all the vessels, separately and as a whole. The aggregate of amount of supplies furnished was about $2,200.

Other parties libeled the four steamers and the appellees filed two intervening libels, one against the Steamer *Lawrence* for half of its claim, and one against the Steamer *Portland* for the other half. Under decree all four of the vessels were sold, but only the *Lawrence* brought enough to pay more than the prior claims of wages. The appellees filed amended libels against the *Lawrence* for the other half of their claim. Appeal was taken from the decree which sustained the amended libels and directed payment of the several amounts out of the fund resulting from the sale of the *Lawrence*.

Judge Knapp, delivering the opinion of the Court, said at page 60 (Italics ours):

> "Nearly 100 years ago, Mr. Justice Johnson, speaking for the Supreme Court in *The St. Jago de Cuba*, 9 Wheat, 409, 416 (6 L. Ed. 122), said:
>
> > 'The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to the forfeited hull to get back, for the benefit of all concerned; that is, to complete her voyage.'

"And this figure of speech expresses the central idea of a maritime lien, namely, the equitable right, springing from the necessities of commerce, to hold the vessel itself for something done or furnished *to it* which enables it to continue in service, and without which its earning power would be greatly reduced, if not destroyed. It is the needful and saving benefit to the *res* which gives the right to proceed *in rem*. On no other basis can that right be supported. And this conception of the essential nature of a maritime lien pervades the whole range of statute law and judicial utterance upon the subject. For example, in 26 Cyc. 787, the principle is summed up as follows:

> 'The basis of a lien for necessaries is a benefit rendered the vessel. Hence, in order for such a lien to arise, the necessaries must be either delivered on board the vessel or brought into immediate relations with her, as by being delivered on the wharf or into the custody of some one authorized to receive them.'

"And this is but a paraphrase of the oft-quoted statement in *The Vigilancia* (D. C.), 58 Fed. 698:

> 'There can be no delivery to the ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship *in rem*, until the goods are either actually put on board the ship, or else are brought within the immediate presence or control of the officers of the ship.'

"But this principle, long accepted and familiar, seems clearly to refute the contention of appellees that the owner of two or more vessels, used in a common service, may by verbal agree-

ment subject them to a joint and several lien, 'singularly and as a whole,' for supplies furnished indiscriminately to all of them, without attempting to segregate or identify the portion designed for any particular vessel, so that each of them will be bound for supplies furnished to the others, even if it receives none itself, and that such a lien will be good as against a prior mortgagee whose mortgage is duly recorded. We cannot assent to the proposition. It is plainly at variance, in our judgment, with the fundamental idea of a maritime lien; nor has it ever been recognized, so far as we are aware, in the general maritime law of the country, or in any legislative enactment."

* * * * * * * * *

"The appellees refer us to a number of cases, among them *The Kalorama*, 77 U. S. 204, 19 L. Ed. 941, and *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, which hold that the owner may by contract express or implied, create a maritime lien for necessary supplies furnished to his vessel, even in the home port. This is undoubtedly the established rule of law, but it seems clearly without application. None of these cases touches, much less decides, the question here presented, namely, whether the owner can, even by express agreement, give a joint and several lien upon two or more vessels which will hold either of them, *not for supplies furnished to it, or intended for its use*, but for supplies furnished to the others, and which lien will be good as against a prior mortgagee. For that contention we find no authority. Indeed, in all the cases cited, it appears either that the supplies were in fact furnished to the particular vessel sought to be charged, or that the decision was put distinctly

on the ground of estoppel, as in *The Worthington*, 133 Fed. 725, 66 C. C. A. 555, 70 L. R. A. 353, where the dispute was solely between owner and libelant, and no rights of third parties were involved. Even in *The Wyoming* (D. C.), 36 Fed. 494, the court said:

> 'Furthermore, if money is advanced to aid in running two steamboats, no lien can be allowed against either *unless the proof shows how much was advanced on behalf of each, and for what purpose it was used.*'

"We therefore conclude that the appellees' claim in this case cannot be sustained, and are the more content to so decide because of our disposition to restrict rather than enlarge the scope of secret liens."

It will thus be seen that this case is directly in point and very favorable to the petitioner's contention in the case at bar. The liens were rightly allowed here, for here

> "the proof shows how much was advanced on behalf of each, and for what purpose it was used."

VI. *As between the owner of a vessel who agrees to give a maritime lien for money or supplies and the person furnishing the money or supplies on the credit of the vessel, the owner is estopped to deny that the money or supplies were actually used for the vessel.*

In *The Worthington*, 133 Fed. 725, a bank advanced the sum of $300 to the owner of a vessel upon the credit of the vessel in order to enable the owner to load his ship. On the trial it was sought to be shown that the money was not actually used to load the vessel or for

any maritime purpose. The Court refused to receive such evidence holding that the owner was estopped to deny that the money was used for the purpose represented and so defeat the lien.

In the case at bar, the Oil Corporation bought the coal for their fleet, and the necessity for the possession of that coal was pressing and vital. We submit that the Oil Corporation and, consequently, anyone taking title through it, as did the claimant here, is estopped from denying that the coal was used for the fleet upon the credit of which the coal was furnished.

To the same effect as *The Worthington* (*supra*), are *The Schooner Mary Chilton*, 4 Fed. 847; *The Robert Dollar*, 115 Fed. 218.

In *United Hydraulic Cotton Press* v. *Alexander McNeil*, Fed. Cas. No. 14,404, 20 Int. Rev. Rec. 175, money was advanced to the master on the credit of the ship and spent recklessly by him. The mortgagee of the ship set this fact up to defeat the lien, but the Court held the lien was valid.

In the case of *The Mary*, 1824, 1 Paine, 671, the owner of a vessel gave a bill of sale in the nature of a mortgage but was suffered to remain in possession and act as absolute owner, and her register and other papers remained unaltered. Some eight months thereafter he gave a bottomry bond for money advanced to purchase cargo. Judge Adamson held that upon principle the claim of the lender was to be preferred to that of the mortgagee. This is a leading case and is cited frequently as an authority.

It is quite clear from the preceding authorities that, under the undisputed circumstances in this case, the

libelant was entitled at least to the relief given by Judge Brown, namely, to the maritime liens against the several vessels and for the amount of coal actually used by each, irrespective of the fact that the coal passed through coaling stations of the owner before it was actually put on board the vessels.

VII. *The decision of the Circuit Court of Appeals presents a controverted question of public importance which it is submitted should be settled by this Court.*

The petitioner asks for a review of the decision of the Circuit Court of Appeals on two grounds:

First: That it is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *The Yankee*, 233 Fed. 919.

Second: That the question whether the Act of Congress governing Maritime Liens is available to the owners of vessels operated in fleets upon the state of facts here presented is a question of public importance.

While the Circuit Court of Appeals in the opinion in the present case written by Judge Dodge, does not directly question the decision of the Circuit Court of Appeals in the Third Circuit in the case of *The Yankee*, it is evident that Judge Dodge regarded the case as having been erroneously decided and was unwilling to be guided by the principles underlying it. He refers to the opinion in *The Yankee* as going further than that of any other Court in interpreting the provisions of the Act of Congress, but makes no effort to distinguish the case of

The Yankee from the present one, other than to note that in the case of *The Yankee* where, as in the present case, coal was contracted for by the operating owner for the use of a fleet of vessels, The *Yankee* was specifically named as one of the vessels of the fleet, and it was understood that a specified amount of the coal so contracted for in the name of the owner was for the use of The *Yankee*.

We doubt the correctness of Judge Dodge's interpretation of the Court's opinion in the case of *The Yankee*.

It does not appear from the opinion that The *Yankee* was in fact specifically mentioned by name in the negotiation of the contract, or that she was identified otherwise than as one of the units of the fleet for which the coal was purchased. Neither does it appear, as we read the case, that the exact amount of coal intended for the use of The *Yankee* was definitely fixed and specified, all that the opinion discloses on this point is that "*the quantity to be supplied and daily consumed by the Yankee was mentioned and considered by the parties*".

Clearly the libelant of The *Yankee* had done precisely what the petitioner did in the present case; he sold a large quantity of coal to the owner of the fleet for the indiscriminate use of the vessels of the fleet and delivered the coal to the owner on the credit of the maritime lien on the vessels afforded by the Act of Congress, and left it to the agency of the owner of the fleet to make delivery of the coal to The *Yankee* and other vessels of the fleet and to make the apportionment among them from time to time on the basis of their respective requirements and not on the basis of any specific allotment agreed upon at the time the coal was delivered to the owner.

We contend that upon the actual facts the cases are parallel.

Even assuming, however, that Judge Dodge correctly states the facts disclosed in the case of *The Yankee*, it is still evident that in principle the two cases cannot be distinguished.

There is no substantial reason why the name of the vessel should be specified; it ought to be sufficient if the vessel is identified with reasonable certainty as Judge Brown suggested in the District Court, and we submit that it is so identified when it is mentioned as one of the units of the fleet. Neither can we perceive any substantial reason why the "exact quantity" of coal to be furnished to any one of the vessels of the fleet should be indicated prior to the delivery of the supply to the owner; on the contrary, there are important practical reasons why the apportionment should be left to the agency and discretion of the owner. We quote in this connection from the opinion of Judge Brown, *Record*, page 134:

> "As, supplies for fleets of vessels under a common ownership and management in the ordinary course of business are contracted for in view of the general requirements of the entire fleet; as, supply men will thus be called upon to furnish supplies in advance of the arrival of the vessels; as, at the time supplies are ordered there may be uncertainty as to which vessel may require them and use them, the Statute should receive a construction which will make it applicable to and consistent with modern business conditions. A supply man who furnished supplies ready for any vessel of the fleet that may call for it should not be deprived of the same right to a lien as a supply man who is told the name of a vessel which is to require the supplies.

> "The appropriation of the coal to a particular vessel though made by the owner, yet, if done in pursuance of the course of business contemplated by the parties, must be regarded as completing 'a furnishing' by the libelant to 'a vessel' which is identified by the act of the owner in placing the coal aboard."

That the movement of vessels is necessarily uncertain is not the only fact to be considered.

Ship owners purchasing supplies for fleets of ocean going vessels or for the cargo carriers of the Great Lakes or even for smaller fleets of trawlers and fishing vessels, can no longer depend on the stocks on hand in the ship chandleries along the water front, as was the practice at the time of the early decisions referred to by Judge Dodge.

Practically all supplies are now purchased in large quantities directly from the manufacturer and producers and coal, the vital factor in the supply service of every great shipping concern, is purchased directly from the mine owners.

These supplies which originate at interior points are brought to tidewater and lake ports through the agency of rail carriers and the deliveries to the consignee are dependent on car supply, weather conditions, and a variety of other circumstances, and are uncertain.

Accordingly, the ship owner, unless his vessels are to be detained in port to await the uncertain arrival of supplies and unless railway equipment is to be detained on sidings to await the uncertain arrival of vessels, very often feels that it is necessary to maintain extensive

storage plants at the bases where its vessels take on supplies.

Purchases are made months in advance of the approximate dates for the delivery of the supplies by the rail carriers and can not, in the nature of things, be made in the name of a particular vessel or for the requirements of a particular vessel and can not ultimately be delivered to a particular vessel without disruption and disorganization of the ship owner's arrangements, otherwise than through the agency of the ship owner.

It is, of course, manifestly to the interest of the public, especially under prevailing war conditions, that all storage plants and facilities be utilized and that large purchases of supplies be made at such times and in such manner as will permit intensive employment of railway equipment by rail carriers engaged in transporting the nation's commerce. It would be intolerable either to detain a vessel in port to await the arrival of freight, or to detain railway equipment upon a siding to await an arrival of a vessel. Yet, these results are inevitable if the coal suppliers, by reason of a narrow construction of the Lien Act, are required either to surrender the benefit of the Act in contracting to sell supplies and revert to the business conditions of an earlier century.

We believe that to accomplish this, the decision of the Circuit Court of Appeals must be reversed and that, therefore, a writ of certiorari should issue in the present case.

The case is one of unusual hardship. The petitioner parted with its coal solely upon the security of Oil Corporation's agreement to give it a lien under the Act of Congress.

The coal for which its lien was upheld in the District Court, was actually delivered to and used by the libelled vessels and by reason thereof the vessels were kept afloat and in operation, contributing earnings to the Oil Corporation and its creditors, including the Seaboard Fisheries Company, the claimant herein, which pursuant to foreclosure proceedings, purchased the libelled vessels with knowledge that the petitioner asserted against them maritime liens for coal actually delivered to them and for which it had never been paid.

It is submitted, therefore, that this Court should grant the writ of certiorari asked for, in order that the error of the Circuit Court of Appeals should be corrected and the decision of the District Court sustaining the libelant's liens reinstated.

Respectfully submitted,

J. Parker Kirlin,
John M. Woolsey,
F. C. Nicodemus, Jr.,
Of Counsel.

September, 1918.

NO. 6[illegible]58

In the

Supreme Court of the United States,

October Term, 1918

Nos.

PIEDMONT & GEORGES CREEK COAL COMPANY
Libelant-Petitioner,

against

The Fishing Steamer WALTER ADAMS and others,
SEABOARD FISHERIES COMPANY,
Claimant-Respondent.

The Fishing Steamer HERBERT N. EDWARDS,
SEABOARD FISHERIES COMPANY,
Claimant-Respondent.

The Fishing Steamer ROLLIN E. MASON,
SEABOARD FISHERIES COMPANY,
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The Fishing Steamer WILLIAM B. MURRAY,
SEABOARD FISHERIES COMPANY,
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The Fishing Steamer MARTIN J. MARRAN,
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The Fishing Steamer AMAGANSETT,
SEABOARD FISHERIES COMPANY,
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(Consolidated Case.)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

(With opinion of the Circuit Court of Appeals)

ROYALL VICTOR,
RATHBONE GARDNER,
Counsel for Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

(With opinion of the Circuit Court of Appeals)

Statement.

It is true, as the petition says, that there is little or no dispute about the facts. Inasmuch, however,

(Note: The opinion of the Circuit Court of Appeals, Dodge, J., is printed at the end of the brief.)

as it seems to us that the petition and the statement of facts in petitioner's brief omit or slur over certain aspects of the transaction that we consider important, we submit the following condensed statement as the basis for the points to be made in our brief in opposition.

1. *Respondent stands in the position of a prior mortgagee.* Respondent is the purchaser at a receiver's sale under a mortgage given by the Oil Company, antedating the sale of the coal to it. No argument, we take it, is needed to show that if, as against a furnisher of supplies, the rights of the vessel owner himself may sometimes differ from the rights of a prior mortgagee from him, then the respondent in this case stands in the shoes of such prior mortgagee.

2. *The contract for the sale of the coal.* The contract was an informal one. Judge DODGE, in his opinion, says that:

> "It was never completely embodied in any written document."

Though this is true, the general terms of the prior oral agreement are at least clearly evidenced by two letters dated May 28, 1914 (Cl. Exs. 8 & 9, pp. 116, 117). These letters clearly show an agreement to supply the Oil Company with its coal requirements for the season at Promised Land and Tiverton. ("This is to confirm agreement for the furnishing of your coal requirements at Promised Land and Tiverton for the current season." Prices and grades of coal are specified. Ex. 8.) The Oil Company had factories in both these places at which it

used coal, and there cannot be the least doubt that the Coal Company knew this fact, and that both parties perfectly understood that the Oil Company might rightfully use any coal ordered and delivered under the contract either for its factories or for its vessels, as occasion required. It is, to be sure, quite probable that the vessel requirements were expected by both parties very largely to exceed the factory requirements (which they did). (As a matter of fact, of the coal delivered under the five shipments in question, between one-fifth and one-sixth was used in the factories, the remainder by the vessels—some, however, by vessels not libeled.) The point is that, under this contract, the Oil Company had the *undoubted right, at the very least, to appropriate (and it did appropriate) for its factories whatever coal these might require out of any shipment ordered.* We note also that the two above mentioned letters contain no reference whatever to any agreement or understanding with reference to a maritime lien for the coal supplied. The evidence shows that this understanding or agreement, whatever it may have been, was arrived at orally some three months before these letters were written (See record, pp. 26-27. Of this understanding later).

3. *Shipments and deliveries under the contract.* As orders for coal were given by the Oil Company under the contract, deliveries were made f. o. b. New York and New Jersey wharves. Judge DODGE's opinion states that

> "the invoices and bills of lading relating to the shipments, indicate that delivery of all the

> coal so shipped to the oil corporation took place at the libellant's loading piers."

We believe this statement is correct, though in fairness we should say that we do not think the documentary evidence shows whether the *barges* in which the coal was sent or shipped to Promised Land and Tiverton belonged to the Coal Company or the Oil Company. Mr. Meadows, the manager of the Oil Company, says he thinks two of the shipments were made in a barge owned by the Oil Company and three in barges owned by the Coal Company (p. 47).

It should be noted that in the original libels against the five vessels the deliveries are all alleged to have been made at Staten Island and Port Reading, N. J. (Rec., 202, 205, 248, 250, 286, 289, 324, 327, 362, 365).

4. *The orders.* The orders for the five shipments in question are the last five of the nine orders printed as Libelant's Exhibit 1 (pp. 100-102). It will be observed that these orders are all in the name of the Oil Company (see also Cl. Ex. 7, p. 115, a letter of the Oil Company, relative to one of the shipments), and that none of them specifies that the coal ordered or any part of it was for the use of any particular vessel, or for the use of vessels generally, as distinguished from the factories. The invoices similarly (in their original form) were all to the Oil Company, and the coal was also charged on the Coal Company's books to the Oil Company.

5. *Handling of the coal at Promised Land and Tiverton.* The coal on its arrival at these places was all put in the Oil Company's bins on its

wharves, where it remained until the steamers called for it or until it was used in the factories. *In the bins at Promised Land there were already 1,068 tons of coal.* The lien coal delivered at Promised Land (4,459 tons) was mixed with this, making a total of 5,527 tons. As to the shipments to Promised Land, therefore, there was no possible way of proving (and there was no attempt to prove) *just how much* of the lien coal was used on the steamers that coaled there. It *may* be that most or all of the original 1,068 tons went into the steamers, which would by so much have reduced the amount of lien coal used by them, and by so much increased the amount of lien coal used in the factories. Or *vice versa*. There is no telling. What the District Court did was to deduct 20 per cent. from the amount of coal shown to have been taken by each libeled steamer at Promised Land, the 1,068 tons being approximately one-fifth of the total of 5,527 tons.

6. *The alleged contract for a maritime lien.* We do not wish to be undestood as denying that there was some agreement or understanding between the parties as to a maritime lien for the coal. Almost certainly there was. We take it moreover that on this petition for certiorari this Court will not go behind the finding of the Circuit Court of Appeals. The opinion of that Court states that

> "The evidence as to the precise agreement made in this case as to liens upon the Oil Corporation vessels is far from definite, and by no means such as would be sufficient in any event for the establishment of a maritime lien by express consent of the owner."

Also:

> "We regard the evidence as establishing at most such an understanding as the District Court found to have existed,—that 'the law would afford a lien upon the vessels for the coal',—that is, *according to the libellant's present contention,* upon each vessel afterwards supplied, for the coal supplied to her" (italics ours).

We may point out, however, that if the agreement *was* really anything more than a mutual understanding that the law would give the supplier some sort of a lien, it was an informal understanding that there should be a lien *on the fleet as a whole for coal used by any vessel of the fleet* (See *Meadows, Rec.* 27, 52). It was on the theory of an express agreement for such a *fleet lien* that the first counts of libelant's five original libels were drawn. The District Court held that such a fleet lien could not be created even by express agreement, and, as libelant did not appeal, this question is not now before this Court, though, as will appear, the authorities on the point are all squarely against petitioner.

7. *The subsequent alteration of the invoices by the parties.* We call attention to this incident merely that there may be no confusion in the minds of the Court. As already stated, the invoices were originally made to the Oil Company and not to any of its vessels. In September, 1914 —after all the coal had been delivered and when the Coal Company was threatening libels against all of the Oil Company's fleet—the Coal Company was induced to libel only the five best boats. In furtherance of this plan, the headings of the five original invoices (charging the coal to the Oil Com-

pany) were torn off and new headings pasted on, each new heading charging the coal to one of the five vessels to be libeled.

BRIEF.

Libelant-petitioner is now asserting a *statutory* maritime lien under the Act of June 23, 1910 (there being no other statue on the subject) and not a non-statutory maritime lien.

> "The District Court has held that no maritime lien could be created apart from the statute. * * * No cross appeal was taken by the libelant and the only question before the Circuit Court of Appeals was whether in view of the understanding of the parties that the coal was furnished on the credit of the vessels * * * a lien was impressed upon the libeled vessels by force of the statute." (Brief, p. 17.)

POINT I.

The Act requires a "furnishing to" a vessel to be established, and expressly abolishes "credit to the vessel" as a requisite of a statutory lien. Nevertheless, libelant's claim to a statutory lien necessarily involves the proposition that these two phrases are synonymous.

There can, we submit, be no escape from this conclusion. The demonstration is as follows:

We have a contract for a season's supply of coal. It is perfectly understood and agreed that some of the coal is to be used by the buyer to coal his

fleet and some for shore purposes, according to the buyer's needs from time to time. The contract is silent as to whether *orders under it* for shipments shall specify a maritime or non-maritime use of the whole or a part of any particular shipment, and the orders under it make no such specifications, being merely for the owner's general requirements. These orders are filled by delivery to the owner, at the seller's wharves, as the Court has found, though we think it would be immaterial if they were delivered at the owner's wharves. At the owner's wharves the coal is unloaded, not into or alongside the vessels but into the owner's bins, in which it will await the *owner's* subsequent appropriation of it to his factories or to his steamers. It is known, moreover, to the seller that these bins may contain (and one of them does contain) other coal with which it will be perfectly permissible for the owner to mix the contract coal.

So much for the contract and its contemplated and actual carrying out, *eliminating everything in the nature of an agreement, express or implied, for a maritime lien.*

The contract itself is clearly not a maritime contract (the authorities are cited *infra*, pp. 26-27).

It is equally clear that the seller's deliveries under it of the coal to the owner and the owner's subsequent placing of some of it in his vessels do not constitute a furnishing (in the sense of a delivery) of the coal by the seller to the vessels. No authority has been or could be cited, either under the Act of 1910 or under the general maritime law, for such an astonishing proposition as the proposition that there is a furnishing of supplies to a vessel by a supplier where nothing more appears than (1) that the supplies have been sold to

the owner under a general contract which contemplates a non-maritime use of part of them, (2) that the deliveries under it have been made to the *owner* for his subsequent appropriation of the supplies to maritime or non-maritime uses as his needs require, and (3) that the owner moreover may rightfully mingle the goods with other goods of the same kind. And counsel's brief, of course, virtually concedes, though it nowhere expressly admits, that the transactions in question could not possibly amount to a furnishing to the vessels by libelant except for the added circumstance of the agreement or understanding between the parties that libelant should have a maritime lien. All the counts of all the libels allege a contract for a lien, a plain indication that petitioner's counsel recognized the necessity of proving a credit to the vessels in order to establish a lien under the Act.

In *The Cora P. White,* 243 Fed., 246, the facts were identical with the facts here, except that there was no evidence of an agreement or understanding that the vessels should be subject to liens. There, as here, the supplies were delivered to the owner on orders that specified no vessels, were stored by the owner, and subsequently appropriated, some to maritime and some to non-maritime uses. The libels were dismissed.

In short, libelant, in order to sustain its claim to a statutory maritime lien, must establish the necessary "furnishing to" the vessels *by proof of the very thing that the statute says it need not prove—namely, the giving of credit to the vessels:* —and the proposition of law necessarily asserted by petitioner is this: that under the Act of 1910 a furnishing of supplies to a vessel may be shown

by an agreement or understanding that credit is to be given the vessel, where, except for such an understanding, it is incontrovertible that there would be no such furnishing to the vessel. In other words, petitioner's position is that an agreement to "give credit to the vessel" and a "furnishing of supplies to the vessel" are interchangeable terms. A singular contention, truly, under a statute which expressly requires proof of one of these matters and expressly dispenses with proof of the other.

POINT II.

The phrase "furnishing to a vessel" is used in the Act in its accepted sense in the general maritime law as indicating the active agency of the seller in effecting delivery.

We think this proposition requires little argument. The cases under the Act in which the meaning of the expression "furnishing to a vessel" is discussed contain nothing whatever to indicate that the words have any other meaning than their well recognized meaning under the general maritime law. In *The Geisha*, 200 Fed., 865, a recent decision under the Act by the District Court for the District of Massachusetts, Judge DODGE said at p. 868:

> "To maintain a lien under that Act for materials to be used in repair, the materialman must show them to have been actually 'furnished to' the vessel, and I think the intended meaning of that phrase as used in the Act can only be the meaning generally given to it in the maritime law."

There is no authority to the contrary, and, of course, the principle is settled that, generally speaking, a statute which uses a phase with a well-known technical legal meaning adopts that meaning.

We may also quote from an article on the Act by Mr. FITZ-HENRY SMITH, Jr., entitled "The New Federal Statute relating to Liens on Vessels," 24 Harv. L. Rev., 182, 200:

> "And under the federal statute, as under the general maritime law, the things furnished must at least be 'appropriated' to the use of a designated vessel. For there can be no claim upon a given *res* unless it be shown that the necessaries (or services) were furnished specifically to that *res.* * * *
>
> "The Act of Congress is perhaps open to criticism for not defining the meaning of the term 'furnish.' That an explicit definition of this word would be beneficial may be admitted, for there is at present a conflict of authority upon the subject. Thus it is set forth in some cases that no lien can exist unless the supplies and repairs are actually used by or incorporated in the vessel; while others do not lay down so strict a rule. But the difficulty of determining just where the line should be drawn led to the omission of any definition in the law, and the courts, as heretofore, must decide upon the facts in each particular case. The view of Addison Brown, J., in *The Vigilancia,* seems to be the one now most generally recognized, namely, that 'There can be no delivery to the ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship *in rem,* until the goods are either actually put on board the ship or else are brought within the immediate presence or control of the officers of the ship.'"

POINT III.

The phrase "furnishing to" does not make an eventual maritime use of the supplies the test, and decisions under state statutes giving liens for supplies, etc., furnished "for or on account of" vessels are no authority as to what constitutes a "furnishing to" a vessel under the Act of 1910.

Libelant's contention comes to this: That what would ordinarily be a furnishing of supplies *to an owner for his vessels* is changed to a furnishing *to the vessels* to which the supplies are later appropriated by the owner, by proof of an agreement or understanding that credit was given the vessels. Unless that is true under the general maritime law (as we shall show it is not) it is certainly not true under the Act. Had it been the intention of the Act to change the law in respect of what constitutes a furnishing to a vessel, as well to dispense with the necessity, which theretofore existed in certain cases, of proving a credit given to the vessel, the Act would certainly not have retained the well-known expression of the general maritime law emphasizing *the supplier's active agency in effecting the delivery;* but would have substituted for it some other form of words indicating that *the ultimate destination of the goods* was the test. For this purpose the draftsman of the Act had the precedent of a number of state statutes. Two statutes of this sort were involved in the two cases on which the District Court chiefly relied for its decision. *The Kiersage*, 2 Curt., 421, Fed. Cas. No. 7762, and *Berwind-White Coal Mining Company vs. Metropolitan SS. Company*, 166 Fed., 782

(on appeal 173 Fed., 471). The Maine statute in *The Kiersage* gave a lien for performing labor or furnishing materials "for or on account of any vessels" building or standing on the stocks, etc. The New Jersey statute involved in the *Berwind-White* Case gave a lien for "work done or materials or articles furnished in this state for or towards the building," etc., of vessels. As Judge Dodge has pointed out in his opinion, statutes worded like these differ so materially from a statute which gives a lien for supplies furnished *to* vessels, that decsions under them cannot be regarded as authority on the question of what constitutes a furnishing to a vessel under the general maritime law. We think there is nothing to add to the opinion of Judge Dodge below on this subject and to his earlier language, referred to therein, in *The Geisha*, 200 Fed., 865, 868.

POINT IV.

Maritime liens are *stricti juris* and not to be extended by construction, analogy or inference. This rule applies with particular force in determining what is a sufficient delivery to the vessel under the Act, for the Act clearly distinguishes between *delivery* and *credit* to the vessel, requiring the one and discarding the other.

As Judge DODGE points out:

> "When the statute was passed in 1910, no principles of the maritime law of the United States were more fully recognized or more firmly adhered to than those set forth in the

familiar statements by the Supreme Court in *Vandewater vs. Mills* (The Yankee Blade), 19 How, 382, 389, to the effect that maritime liens are *stricti juris* because they may operate to the prejudice of general creditors and purchasers without notice, and that they cannot be extended by construction, analogy or inference."

The following additional quotations will suffice:

The Larch, 14 Fed. Cas., 1139 (2 Curt. 427) at 1141:

> "A lien being an exception to the general rule, which entitles all creditors to participate equally in all the property of their debtor, and a maritime lien being also a *jus in re*, which goes with the thing into the hands of purchasers, and so is embarrassing to commerce, it is *stricti juris;* must be derived from some provision of positive or customary law, which clearly confers it in the case in judgment; and it cannot be made out by way of argument from analogy, nor from considerations of convenience. Such considerations are for the legislator alone."

Munn vs. The Columbus, 65 Fed., 430, 432:

> "The courts are jealous of the extension of admiralty liens and more inclined to restrict than to extend them."

Prince vs. Ogdensburg Transit Company, 107 Fed., 978, 982:

> "Maritime liens for repairs and supplies, being secret incumbrances, are not favored. They are allowed only upon grounds of commercial convenience and necessity."

The Aurora, 194 Fed., 559, 560:

> "A maritime lien is a privileged one, secret in character, overriding all other liens or

transfers, possibly operating to the prejudice of creditors or purchasers without notice. In the nature of things it is *stricti juris*, and must be shown to exist."

And, on the question of statutory construction presented in the case at bar, this principle certainly should apply with peculiar force, for, while the statute is undoubtedly remedial with respect to one element—namely, the *contractual* element—of maritime liens, with respect to the other element—namely, the non-contractual unilateral act of delivery—it deliberately retains the familiar phraseology of the general maritime law. Let a material-man furnish supplies *to* a vessel on the order of the owner, and he obtains his lien even though he has never heard of the statute and knows nothing about his rights under it, unless it is affirmatively shown (see Sec. 4) that he has waived his right to a lien. It would be a strange construction of the Act—which so clearly distinguishes between the contractual and the non-contractural elements of maritime liens, discarding the one and retaining the other—if the retained non-contractual element had to be defined in terms of the discarded contractual one.

The decisions under the Act continue to invoke the rule of *stricti juris*.

The Dredge A, 217 Fed., 617, 637;
Astor Trust Co vs. White, 241 Fed., 57, 62;
The Cora P. White, 243 Fed., 246, 248.

POINT V.

The Act of 1910 necessarily uses the expression "furnishing to a vessel" in the sense of a *delivery* to and not in the sense of a *credit* to.

If this were not so, the Act would make nonsense, for it would read in effect:

> "Whoever, on the order of the owner, furnishes supplies to a vessel *on the credit of the vessel* has a lien on the vessel, and it shall not be necessary to allege or prove that credit was given the vessel."

Whatever else, therefore, "furnishing to" means in the Act, it cannot possibly mean "crediting to."

Undoubtedly the maritime law notion of a furnishing to a vessel includes the idea both of a *delivery* to and of a *sale* to—a contract with, and so a credit to—the vessel. Prior to the Act the vast majority of the cases dealt with the question of furnishing to in its meaning of credit to; the question in them was whether there had been an express agreement (or whether an agreement could be implied), to give credit to the vessel, although the supplies had been *delivered* to the vessel in the most immediate manner. A credit to the vessel (a furnishing to in the contractual sense) usually had to be proved unless the goods were sold on the order of the master in a foreign port, even though they had been manually placed on board by the seller.

And, of course, the controversy, whether on this that or the other state of facts, there had been a sufficient showing of a furnishing to the vessel in this contractual sense was the very controversy

which the Act attempts to prevent from arising in the future by providing, namely, *that a furnishing to in the sense of a delivery to is alone sufficient to create a lien, and that a furnishing to in the sense of a credit to need not be shown.*

The proposition that petitioner has to establish, however, is the exact converse of this, namely, *that a furnishing to in the sense of a credit to dispenses with the necessity of showing a furnishing to in the sense of a delivery to.* Not a case to this effect has been cited.

Instead, we are cited to a host of pre-statutory cases *in all of which the immediate delivery of the supplies to the vessel was undisputed,* the question in dispute being whether, in spite of that fact, there had been a sufficient showing of a furnishing to in the sense of a credit to the vessel, the goods having been supplied to it in the home port or on the order of the owner. Cases of this sort in this court are:

The Grapeshot, 9 Wall., 129,
The Lulu, 10 Wall., 192,
The Patapsco, 13 Wall., 329,
The Valencia, 165 U. S., 264;

and numerous other cases in the lower Federal Courts have also been cited.

The question in the case at bar obviously is—What does the maritime law regard as a sufficient furnishing to a vessel in the non-contractual sense of a delivery to the vessel?

POINT VI.

The rule as to what constitutes a furnishing to a vessel in the sense of a delivery to her requires at the very least that specific goods be bought or ordered for a specific vessel and that the seller deliver them to the owner at some point in the course of an uninterrupted carriage to the vessel.

In the frequently cited case of *The Vigilancia*, 58 Fed., 698, 700, the rule with respect to the furnishing to the vessel (or as the Court there put it the "delivery to the ship") was stated as follows:

> "There can be no delivery to the ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship *in rem*, until the goods are either actually put on board the ship, or else are brought within the immediate presence or control of the officers of the ship. *The Cabarga*, 3 Blatchf. 75; *Pollard v. Vinton*, 105 U. S. 7, 9-11; *The Caroline Miller*, 53 Fed. 136; *The Guiding Star*, Id. 936, 943, and cases there cited.
>
> "Had the goods in question been lost while in transit from Jersey City to Roberts' Stores, where the ship lay, the steamship company might possibly have been personally liable for the goods; but plainly no lien for them could have arisen against the ship, because they would never 'have come to the benefit of the ship.' Per Nelson J. (*The Cabarga, supra*). No lien, therefore, arose when the goods were delivered to the truckmen in Jersey City, since the ship had not yet received the goods, and might never receive them. Something more had to be done, viz., to deliver them to the ship. As that delivery was an act necessary to the creation of a maritime lien, it follows that the 'furnishing to the ship,' so as to ac-

quire a lien, was only completed at the place where the ship herself actually was."

See also

The Cimbria, 156 Fed., 378, 382.

That the rule laid down in *The Vigilancia* has been somewhat relaxed in later cases we do not deny, but we do deny that it has ever been relaxed to the extent of holding a delivery to the ship to have been made where, when the delivery to the owner took place, there had been no identification of the vessel which was to use the supplies; and we also deny that it has ever been qualified by permitting an understanding that credit was to be given to the vessel (either to *the* vessel or to some as yet unascertained vessel), to convert what would otherwise not be a delivery to the vessel into such a delivery.

In *The Cimbria* (*supra*), it was held that, although credit had been given the vessel, nevertheless no lien had been acquired under the general maritime law, because the supplies had not been "furnished to" her. See also *The Bethulia*, 200 Fed., 876.

In *The Geisha* (*supra*), a lien was allowed under the Act of 1910 for a boiler which had been especially ordered and made for the vessel in question, and the sections of which had been delivered on the wharf alongside her. The vessel was attached at the suit of the owner's creditors, and the boiler sections therefore were never put on board. It was held that this constituted a sufficient furnishing to the vessel under the Act. Judge DODGE said at p. 867:

"It may not be necessary to prove that the materials have been actually incorporated into

the vessel; but I cannot doubt that they must appear to have been delivered to her, either on board her, or at least 'within the immediate presence and control of her officers,' as was held regarding supplies in The Vigilancia (D. C.), 58 Fed., 698, 700. See, also, The Cimbria (D. C.), 156 Fed., 378, 382. As this vessel was not in commission during the repairs, but alongside the libelant's wharf, and thus not in the actual custody of her officers, but rather of the libelant, to which custody, for the time being, she had been intrusted by her owner, delivery by the libelant on the same wharf may not unreasonably be regarded as the equivalent of delivery into the control of the vessel's officers * * *. In view of the facts that the libelant had furnished the sections on the wharf all ready to go on board, and that it would unquestionably have done the little remaining to do in order to get them on board, but for a condition of affairs for which the owner was solely responsible, I shall hold that it furnished the sections to the vessel within the meaning of the act, and allow the $140 which it paid for them."

In *Ely vs. Murray & Tregurtha Company*, 200 Fed., 368, decided in the District Court by Judge Dodge, and affirmed on appeal by the Circuit Court of Appeals, an engine had been ordered for a gasolene launch by the owner. The libelant shipped the engine from Boston by public conveyance to New York, where the owner received it, paid the freight on it and had it sent to the yard in Brooklyn where the launch lay and where it was installed in her. The question of libelant's lien arose between libelant and the owner himself.

Judge DODGE, after referring to *The Vigilancia* and *The Cimbria* (*supra*), said at p. 369:

> "Whatever might be the decision if the rights of parties other than the owner were to be affected by it, I am of opinion that an owner who has ordered materials or supplies for his vessel, has ordered them delivered to a carrier in order that they may reach her, has actually put them on board the vessel for which they were ordered after receiving them from the carrier, and has them on board her when the libel is filed, cannot be heard to say they have not been furnished to her in order to defeat a lien for them under the statute. *The Gracie Kent* (D. C.), 169 Fed., 893. I hold, therefore, that the libelant has a lien for the price of the engine and materials."

This *Tregurtha Company* case (in which the rights of a mortgagee were not involved) marks the extreme limit of the relaxation of the rule, with the possible exception of *The Yankee*, 233 Fed., 919 (C. C. A., 3), the case chiefly relied on by petitioner.

On the question chiefly discussed in *The Yankee*, namely, the claim of a lien for various supplies and necessaries, the facts are identical with those in the *Tregurtha* case (*supra*), for the Court found that

> "Each order specified these supplies to be for the Yankee, and in each instance supplies were forwarded to her pursuant to shipping instructions accompanying the order" (p. 921).

In addition to these supplies, however, coal had also been supplied the vessel under a contract to supply coal for the whole fleet, but it was expressly

found by the Court that in giving orders for deliveries under this contract

> "The quantity to be supplied to and daily consumed by The Yankee was mentioned and considered by the parties, and that of the total amount of coal supplied, a definite portion was appropriated for and furnished to The Yankee within the rule of law applicable in such cases" (p. 927).

The facts as to the coal do not otherwise appear, but even if this quoted statement shows that the estimates of the Yankee's consumption was made at the time of the making of the original contract and that thereafter the owner appropriated to her the estimated amounts out of shipments made under orders not designated for and not going to specified vessels but delivered in the first instance to the owner's wharves, the facts are still a long way from the instant facts, for there was *an original specification of definite amounts of coal for a specified vessel.* Judge DODGE thinks that the decision stands for no more than for the proposition which he quotes from the opinion, namely:

> "We hold that a materialman may make actual delivery of supplies to a vessel in the maritime sense, by causing them to be transported by rail and water carriers by interrupted stages from their point of origin to the vessel side, *when the transaction is begun by a valid order indicating that the supplies are for the vessel* and are to be delivered to her, and is completed by an actual delivery to the vessel consistent with the instructions of the order and the intentions of the parties giving and accepting it" (italics ours).

The question as to the lien for the coal was disposed of in one brief paragraph (p. 927), and, of the three cases cited (*The Kiersage (supra)*, *The Murphy Tugs*, 28 Fed., 429, and *M'Rae vs Bowers Dredging Co.*, 86 Fed., 344), *The Kiersage* we have already shown to be wholly inapplicable, *The Murphy Tugs* was a lien for services *actually rendered to the vessel*, while the *M'Rae* case was another case under a state statute, and there again the coal was *actually delivered to the vessels*.

Petitioner relies strongly on this case of *The Murphy Tugs*. That was a case where there was a single contract for *services* as a diver and steam pump engineer, at specified daily wages, on the vessels of a fleet. The services, were actually furnished to the vessels libeled, and the particular services were furnished on the orders of the various masters. The only difficulty in the way of sustaining the libels was that the *original contract* was single. Services, unlike supplies, cannot be delivered to an owner for a vessel; they are rendered direct to the vessel, so that the case is exactly as if, under a general contract for a season's supply, the seller receives an order: "Please deliver into or alongside the Steamer Martin B. Marran 1,000 tons of coal under your contract with us." For the 1,000 tons so delivered the seller would undoubtedly have a statutory lien, for he has furnished the supplies *to* the vessel *on the owner's order*. Precisely such a pre-statutory case, under a contract for a season's supply of coal, was *Cuddy vs. Clements*, 113 Fed., 454 (C. C. A., 1), and there the lien was disallowed only because, the contract having been made with the owner at the port of his residence, the *then* necessary showing of a credit to the vessels

was held not to have been made. See also *Whitcomb vs. Metropolitan Coal Co.*, 122 Fed., 941.

A few other cases cited by petitioner may be noted here:

M'Rae vs. Bowers Dredging Co., 86 Fed., 344. Not only was the lien sustained under a state statute giving a lien for supplies "for" the use of vessels, but the supplies were actually delivered by libelant—

> "* * * delivered in scows from which it was received on board the dredgers as required for use" (p. 349).

The James H. Prentice, 36 Fed., 777. Decided under a Michigan statute giving a lien for "materials furnished in or about the building or in repairing" vessels. The lumber was sold for a specified vessel, and it was actually *placed on deck or alongside for her use.* Some of it was subsequently misappropriated.

The Worthington, 133 Fed., 725. The controversy was between the libelant and the owner himself, and the decision was placed squarely on an estoppel. The vessel was in a foreign port, and the libelant, at the owner's request, advanced the necessary funds to load her on the credit of the vessel. *Held*, the owner was estopped from showing that he had diverted some of the funds thus procured from the purpose for which they were borrowed.

> *United Hydraulic Cotton Press vs. McNeil*, Fed. Cas., No. 14404.

Petitioner's brief quotes, in substance, one of the headnotes to the case. The text nowhere indicates that any such point was discussed or passed upon.

POINT VII.

A maritime lien which, *because of the indisputable insufficiency of the delivery to the vessel*, must rest in contract, cannot be a statutory maritime lien under the Act of 1910. But even if this is not so there is no authority for the proposition that a maritime lien for supplies can be created on unspecified vessels to which supplies, delivered generally to the owner for non-maritime as well as maritime uses, have later been appropriated by the owner. And certainly not by any such agreement as has been shown in this case.

Petitioner is claiming a *statutory* lien, and it would seem plain from the previous discussion that a maritime lien for supplies which cannot possibly be established except by affirmative proof of an agreement to give credit to the vessel cannot be a *statutory* lien, the purpose of the Act being precisely to make the question of credit to the vessel wholly immaterial, except where a waiver is set up in defense. Petitioner's brief, in its elaborate argument on the facts and the inferences of a credit that may be drawn from them, and in its discussion of pre-statutory decisions on the question of credit or no credit, seems to us an excellent example of the very sort of discussion that the Act was intended to put an end to.

But if we are wrong in this, it is nevertheless plain that libelant's alleged contract will not avail it.

On this subject there is little to add to the opinion of Judge Dodge.

The cases are unanimous in denying the validity

of even express agreements for liens on a fleet under general contracts with the owners for supplies to them:

Astor Trust Co. vs. White Co., 241 Fed., 57;
The Cora P. White, 243 Fed., 246;
Munn vs. The Columbus, 65 Fed., 430;
The Knickerbocker, 83 Fed., 843;
The Alligator, 161 Fed., 37;
The Newport, 114 Fed., 713.

In *The Alligator* (*supra*), the Court said, p. 42:

> "A lien does not and should not attach for a supposed credit given to a vessel, unless the service or supplies are clearly shown to have been rendered or furnished to the particular vessel to which the credit is given."

Moreover, as pointed out by Judge Dodge, the contract for the coal was clearly non-maritime and petitioner could not have sued the Oil Company in Admiralty for refusal to accept deliveries under it.

Plummer vs. Webb, 4 Mason, 380, 388, per STORY, J.:

> "I cannot see that the whole contract is here of a maritime nature. There are mixed up in it obligations *ex contractu* not necessarily maritime and so far the contract is of a special nature. In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction, that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime."

The James T. Furber, 129 Fed., 808 (D. C., D. Maine). Lease of a wharf. *Held*, not a maritime contract. The Court said p. 812:

> "It has been repeatedly decided that to give the court jurisdiction over a contract as maritime, such contract must relate to the trade and business of the sea; it must be essentially and wholly maritime in its character."

See also

> *The Advance*, 65 Fed., 766;
> *The Advance*, 71 Fed., 987;
> *The Cimbria*, 156 Fed., 378, 384-385;

and additional authorities cited in Judge Dodge's opinion.

Even if the contract had been one solely for the Oil Company's fleet, it would not have been a maritime contract. *Diefenthal vs. Hamburg etc., Co.*, 56 Fed. Rep., 397; *S. S. Orendale Co. vs. Turner*, 206 Fed., 339.

As Judge DODGE says:

> "It may well be doubted whether, in a contract non-maritime in character as above, a maritime lien for supplies later to be furnished could ever be created by express stipulation therein on the part of the vessel owner."

Petitioner certainly has cited no authorities whatever for any such proposition, except the two cases *under state statutes* relied on by the District Court.

Petitioner cites *The Freights of the Kate*, 63 Fed., 707 (on appeal *The Advance*, 72 Fed., 793).

The cases involved an alleged express hypothecation of (1) freights, (2) vessels. Libelant had guaranteed letters of credit issued to the owner in the home port, to enable the owner to disburse its vessels in Brazil with moneys derived from the guar-

anteed letters of credit. The owner was known to libelant to be insolvent. No vessels seem to have been specifically named. It seems clear that the supplies, etc., to pay for which the money had to be raised had already been furnished; in other words, the liens of the supply-men already existed,

> "* * * for the purpose of enabling its vessels to pay their debts in Brazil and return to New York" (*The Advance*, p. 794).
>
> " * * * means, by the aid of which the owners are enabled to discharge the liens resting upon the vessels in the foreign ports" (*The Advance*, p. 796).

The holding was that, as to the freights, the hypothecation was good against a prior mortgagee and that it created a valid maritime lien by express contract on the freight of all vessels of the line, and not only of the vessels which were supplied with the funds which libelant's guaranty enabled the owners to obtain. With respect to the vessels themselves, the holding was that there was no sufficient evidence of an express contract of hypothecation.

With respect to the freights, the opinion of Judge Brown in the District Court relies strongly on the fact that freights were not mentioned in the mortgage, and much reliance is also placed on the circumstance that freights are after-acquired property.

With respect to the liens claimed on the vessels, *libelants themselves* based their claim solely on the theory that they were subrogated to the rights of the original lienors, the persons who had furnished the supplies. The Court, however, held against this claim of subrogation, and also denied the liens on the ground that no express contract had been proven. It will be seen, therefore, that some of the

language of the Court which intimates that, by express contract, the parties to a maritime contract may create a maritime lien (taking precedence over the lien of a prior mortgagee) on the contracting owner's vessels substantially to suit themselves, is pure *dictum*. That such is not the law is sufficiently shown by the decisions in the fleet-lien cases, cited above.

Petitioner also (p. 66) cites *The Mary*, 1 Paine, 671. This was the case of a formal bottomry bond given by the owner to obtain money with which to purchase cargo. The owner had previously mortgaged the vessel, but had been allowed to remain in possession. *Held*, the lien of the bottomry bond had precedence over the lien of the mortgage. The decision goes on the express ground that the mortgage

> "would not create any valid lien as against a subsequent bona fide purchaser or encumbrancer without notice * * *. *On the principles of the common law as well as of equity* the claim of Daniel Young must be postponed to that of libelant" (p. 677) (italics ours).

The above cases, therefore, are cases of express hypothecation in the nature of bottomry. It is certainly not necessary to discuss the question whether a formal contract in the nature of bottomry could have been made here for a lien on such of the vessels as the owner might subsequently supply with coal delivered under the general contract, for, even if the lien created by such an agreement would be a statutory lien under the Act of 1910 (which we submit it would not), no such express contract of hypothecation has been shown.

As Judge DODGE says:

> "The evidence as to the precise agreement made in this case as to liens upon the Oil Corporation vessels is far from definite, and by no means such as would be sufficient in any event for the establishment of a maritime lien by express consent of the owner."

POINT VIII.

Maritime liens are stricti juris. The reforms contemplated by the Act are clearly restricted to the contractual requirement of *credit* to vessels and do not extend to the non-contractual requirement of *delivery*, and considerations of supposed mercantile and commercial inconveniences caused by long established rules with respect to delivery should be addressed to Congress.

Counsel's arguments based on the alleged hardships to mercantile and commercial interests of a refusal to sanction this startling extension of the law of maritime liens should be addressed to Congress. Maritime liens are *stricti juris*. The purpose of the Act was to enlarge them by dispensing with proof of credit to the vessel where the supplies were not furnished in a foreign port on the master's order. It is now sought to dispense also with proof of delivery to the vessel. How? By evidence of credit given the vessel, thus throwing the whole subject again into the region of contract—of conflicting presumptions, doubtful inferences, and ambiguous parol understandings—from its flounderings in which the Act of 1910 sought to rescue it. The opportunities for fraud and collusion to the preju-

dice of bona fide mortgagees need scarcely be pointed out under a rule by which supplies, apparently bought and paid for in a steamship company's warehouse, and awaiting the owner's subsequent appropriation of them to his maritime or non-maritime needs, may be given senior liens on his vessels. The rule requiring a delivery to the vessel exacts only a little self-help on the part of the supplier. If the owner calls for deliveries before the arrival of the vessels expected to consume the supplies, arrangements can easily be made in the great majority of cases for the segregation of the supplies on the owner's property in the custody of the supply man's custodian. Counsel's reference to war conditions is understandable, but the Act was passed long before any but an exceedingly small minority of Americans had even dreamt of an August 2, 1914. Nor have we heard of complaints about the Act by materialmen since the war.

POINT IX.

The analogy of claims in railroad receivership cases for priorities over mortgage liens is squarely against petitioner.

If this Court thinks that, in maritime lien cases, analogies from equity may be helpful or persuasive, we are greatly obliged to counsel for suggesting (brief, pp. 46-47) the analogy of the situation in railroad receivership cases where priority over mortgage liens has been asserted on behalf of materialmen who have furnished necessary supplies before the receivership. The supplies here were furnished before the receivership, the prop-

erty sought to be charged is corpus and not income, and there is no claim of a diversion of income. So far, therefore, as the analogy may be persuasive, we could not ask for better authority for the dismissal of the libels than the decision in *Gregg vs. Metropolitan Trust Company*, 197 U. S., 183.

We may also call attention again to the fact that respondent, as a purchaser at a foreclosure sale under a mortgage given long before the supplies were furnished, takes the mortgagee's title, Accordingly the sixth point of petitioner's brief (pp. 65-67) relative to estoppels against the owner is entirely beside the mark.

IN CONCLUSION.

We do not believe that the question in this case is of sufficient importance for the allowance of a certiorari. The question is not one of very general importance. The fact that the Act of June 23, 1910 has not yet been construed by this Court is quite beside the mark, since, as we have tried to show, there is no conflict between the decisions of the various Circuit Courts of Appeal on the point involved.

American Construction Co. vs. Jacksonville etc. Ry. Co., 148 U. S., 372, 383.
Forsyth vs. Hammond, 166 U. S., 506, 513.
Fields vs. U. S., 205 U. S., 292, 296.

Respectfully submitted,

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Opinion of the Circuit Court of Appeals.

June 21, 1918.

DODGE, J. Maritime liens, asserted by the libellant Company upon each of the five vessels proceeded against in these cases, for amounts of coal alleged to have been furnished to them respectively during the fishing season of 1914, have been sustained as valid by the District Court. The claimant appeals from the decrees, contending that upon the facts proved the libellant acquired no maritime lien upon either of said vessels.

There is little or no dispute as to the material facts. They are for the most part sufficiently set forth in the opinion below. The William B. Murray *et al.*, 240 F. R. 147.

The libellant had no dealings regarding the furnishing of coal with either of the vessels libelled, through their officers in command; nor did any of its dealings with their owner regarding the coal it claims to have furnished relate to coal required at the time for use by either of said vessels, or to either of said vessels as distinguished from the other vessels included with them in a "fleet" of nineteen fishing steamers in all. Its dealings were only with the then owner of the entire fleet, referred to in the opinion below as the "Oil Corporation," which corporation was employing the fleet, in connection with lands and fishing factories belonging to it at Promised Land, on Long Island, in New York, and at Tiverton, Rhode Island, in a manufacturing business. At the two above-named places the vessels of the fleet delivered fish taken on their successive trips, and also coaled for further trips.

The libellant did not deliver any of the coal it claims to have furnished, directly to the five vessels libelled, or either of them; nor does it appear to have delivered any of said coal to the Oil Corporation directly, either at Promised Land or at Tiverton. The coal for which it claims liens came to those places in five different shipments, on various dates in May, June and July, 1914. Four of said shipments were delivered, as the opinion below states, at Promised Land, and one at Tiverton. But all the shipments came to those places on barges which had taken the coal on board at the libellant's loading piers near New York City, where the libellant had agreed to deliver it under a previous general agreement with the Oil Corporation so to deliver such coal as said corporation might require for its needs at Promised Land and at Tiverton, during said season, at agreed prices per ton; the delivery of all the coal being F. O. B. at said pier. The above facts regarding said shipments from the libellant's piers, not referred to in the opinion below, but appearing from the invoices and bills of lading relating to the shipments, indicate that delivery of all the coal so shipped to the Oil Corporation took place at the libellant's loading piers. In view of them we do not think it can be taken as proved that the libellant delivered any of said coal to the Oil Corporation under the above agreement for delivery, either at Promised Land or at Tiverton. But even if such delivery can be taken as proved there is no question that the coal included in the five cargoes was put on board the barges by the libellant at its New York piers without any understanding that it, or any definite part of it, was for either of the five

vessels libelled, or for any particular vessel of the fleet, or that all of it was for the vessels then composing the fleet. The first shipment, indeed, was expressly identified on the invoice as "coal for factory." There can be no doubt that, according to the understanding between the parties, some at least of the coal to be furnished would be needed in the factories, and the Oil Corporation was left, so far as any understanding with the libellant was concerned, to use the coal either in the factories or on the vessels of its fleet as it might subsequently desire.

If the libellant can be said to have delivered any of the coal comprised in these five shipments to the Oil Corporation, at Promised Land or at Tiverton, there was still no understanding as to the coal so delivered, or any definite part of it, that it was for either of the vessels libelled, or for all five of them, or even for all the vessels in the fleet as distinguished from the factories; and except that the coal was understood to be for use in its business as carried on at those places, its ultimate disposition was left as above for determination by the Oil Corporation subsequently to the making of the agreement regarding coal for the season, and subsequently to both its shipments and its delivery.

The five shipments were all charged by the libellant on its books to the Oil Corporation, without any entries charging any of it either to a specific vessel, or to specific vessels, or to the fleet; and they were billed to the Oil Corporation only, without any reference to vessels or fleet. When the first shipment to Promised Land arrived there, it was put into the Oil Corporation's bins, which

already contained 1,068 tons previously received and paid for by the Oil Corporation in full, under the same general agreement. The remaining three shipments received at Promised Land were dumped on the same pile, and from the entire pile the Oil Corporation used coal as needed, for all the vessels in its fleet of nineteen, and also for running its boiler plant on shore at that place. The shipment received at Tiverton went upon the Oil Corporation's pier there, and was used by it in part for ten of the vessels belonging to its fleet as they needed it, and in part by its boiler plant on shore at that place. Among the vessels which took on board and used some part of the coal included in the five shipments were the five vessels proceeded against in this case.

There was evidence tending to show how much coal each of the vessels took on board at Promised Land out of the entire stock at that place, and how much at Tiverton out of the entire stock there, after the five shipments had been received as above. The District Court determined the quantity of coal subsequently received and used by each vessel libelled, out of the coal included in said shipments, as follows: The respective quantities found to have been taken on board at Promised Land by each of said vessels respectively were reduced by an estimated proportion, being the proportion which the 1068 tons in the pile at Promised Land, before the first of the above shipments to that place had been added thereto, bore to the whole quantity in said pile; after the coal included in said shipments had been added. To the quantities so ascertained were then added the quantities found to have

been taken on board by each vessel libelled, at Tiverton.

Whether the libellant has shown itself entitled to maritime liens upon these vessels respectively for the respective amounts of coal thus ascertained is a question to be determined, not between it and the owner at the time of said vessels, but between the libellant and the present claimant, who had nothing to do with the libellant's agreement with the Oil Corporation, nor with ordering, receiving or using the coal shipped under it as above, and who did not become owner of said vessels until after they had received and used the coal. The Oil Corporation mortgaged its property in 1913, including these vessels, to secure its bonds. A bill to foreclose the mortgage so given had been filed in the same District Court wherein the decree now appealed from was rendered. There was a decree of foreclosure upon said bill, ordering the sale of the mortgaged property; and under it these and the other vessels of the fleet were sold April 24, 1915, before this suit was begun. The claimant was the purchaser of these vessels at the sale. The present libels were afterwards filed against them on June 16, 1915. While the sale did not divest valid maritime liens to which the vessels were subject when sold, the question of the validity of the liens asserted in this suit, is, so far as the present claim is concerned, a question as to the validity of secret or unrecorded encumbrances.

As to the libellant's original agreement with the Oil Corporation to furnish it with coal for the season, it was never completely embodied in any written document. It appeared that when this agreement was made there was a balance due for

coal from the previous year, and that the Oil Corporation was known to be largely indebted, in view whereof there was an understanding between the parties to the effect that the latter should have a maritime lien for the coal it was to furnish, not for the above five shipments specifically,—and upon the Oil Corporation's entire fleet or such vessels belonging to it as might thereafter use any of the coal,—not upon any specific vessels included in it. The District Court found it to have been understood by the parties "that the law would afford a lien upon the vessels for the coal and that the Coal Company would thus have security," and also understood that "a large part of the coal furnished was to be used by vessels of the fleet."

A contract cannot afford the necessary basis for a maritime lien unless it is maritime in its nature, so as to be cognizable in admiralty; and it is not enough that the contract is maritime as to some of its provisions, it must be maritime in its entirety. It was long ago said by high authority:

> "In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime."

Story, J., in Plummer vs. Webb, 4 Mason, 380. The principle stated has since been repeatedly recognized and acted on. The following District Court decisions may be cited: Diefenthal vs. Hamburg, etc., 46 F. R. 397, 399; Richard vs. Hogarth, 84 F. R. 684; The James T. Furber, 129 F. R. 811; 157 F. R. 128; Berton vs. Tietjens, etc., Co., 219 F. R. 719; also the following decisions on appeal: Harvey vs. Henry, 86 F. R. 657; Pacific,

etc., Co. vs. Leatham, etc., Co., 151 F. R. 440; The Pennsylvania, 154 F. R. 9.

Nor, even if the libellant's agreement with the Oil Corporation had covered no coal for factory use and had been an agreement only for the furnishing of such coal as the 19 vessels of its fleet might thereafter require during the season, could it be regarded as maritime in character. It did not "begin and end in the necessities of a particular vessel for a particular vessel for her own voyage" as a contract for supplies must, in order to be within admiralty jurisdiction. "Where owners group together a large number of vessels and make annual contracts for their supplies, the admiralty jurisdiction does not include them because the reason for it does not." The Oil Corporation could not therefore have sued the libellant in admiralty for failure to supply coal according to the agreement, nor could it have sued in admiralty for a refusal to take and pay for coal offered under the agreement. Diefenthal vs. Hamburg, etc., 46 F. R. 397, already cited; S. S. Overdale Co. vs. Turner, 206 F. R. 339.

Part of the agreement is said to have been that the libellant should have the security of a maritime lien for such coal as it should furnish thereunder. It may well be doubted whether, in a contract non-maritime in character as above, a maritime lien for supplies later to be furnished could ever be created by express stipulation therein on the part of the vessel owner. It is at any rate clear, as pointed out in the opinion of the District Court, that no such security could be created upon the entire fleet, irrespective of what use should be made of the coal, nor upon particular vessels of the fleet

for coal furnished to the other vessels. Astor, etc., Co. vs. E. V. White, etc., Co., 241 F. R. 57. Whenever maritime liens created by express contract with the owner have been sustained, the agreed liens have been upon vessels or freight specified at the time of the agreement, and for supplies or advances then agreed to be furnished to them specifically upon such specific credit, and afterward so furnished. The evidence as to the precise agreement made in this case as to liens upon the Oil Corporation vessels is far from definite, and by no means such as would be sufficient in any event for the establishment of a maritime lien by express consent of the owner. The general manager of the Oil Corporation testified that, as he understood, a maritime lien on the entire fleet should be security upon which the libellant was to furnish coal, but to such an agreement no effect can be allowed, as has been stated. We regard the evidence as establishing, at most, such an understanding as the District Court found to have existed,—that "the law would afford a lien upon the vessels for the coal,"—that is, according to the libellant's present contention, upon each vessel afterwards supplied, for the coal supplied to her.

Under the circumstances of this case, the libellant has a lien upon any one of these five vessels if it has proved that it "furnished" the coal received by her as above "to the vessel," upon the order of her owner, within the meaning of the Act of June 23, 1910 (36 Stats. 604); but not in the absence of such proof. This, under the circumstances shown, we consider the only lien which the law afforded it.

Assuming that the libellant can be said, in the case of any one of the vessels, to have "furnished to" her the coal she received, in the statutory sense,

the furnishing may be said to have been "upon the order of her owner". But the question is, whether any such assumption can be made, in view of the facts that after turning over to the owner of the fleet the entire quantity of coal shipped as above, the libellant left it wholly to the owner to select, out of the fleet, the particular vessels by which the coal was to be received and used; and to determine the particular part of said quantity to be put on board each such vessel, as well as the particular time for putting it on board.

The Federal statute enlarged the maritime law as it had previously stood, by permitting the acquirement of maritime liens upon vessels, for supplies furnished to them, as well in their home ports as in foreign ports. This it accomplished by providing that proof of furnishing such supplies to a vessel should be sufficient proof of credit given to the vessel therefor,—definite proof of credit so given having always previously been held necessary, whenever what had been furnished had been furnished at the port of the owner's residence. We see no reason to believe that the statute intends the same result to be accomplished without proof that the supplies for which a lien is claimed have been furnished directly to the vessel, and not merely furnished to the owner without definite and distinct reference to her.

When the statute was passed in 1910, no principles of the maritime law of the United States were more fully recognized or more firmly adhered to than those set forth in the familiar statements by the Supreme Court in Vandewater vs. Mills (The Yankee Blade), 19 How. 382, 389, to the effect that maritime liens are *stricti juris*, because they may operate to the prejudice of general credi-

tors and purchasers without notice, and that they cannot be extended by construction, analogy or inference.

It was also well settled, prior to the statute, that credit given by a material man to a vessel was not proved unless supplies or materials intended for her were shown to have been furnished directly to her. While actual delivery by him on board, or (in the case of materials) actual incorporation in the vessel was not necessary under all circumstances to constitute such direct furnishing by him, mere delivery to the owner without special reference to the particular vessel, was not accepted as sufficient proof; there must have been at least such delivery to the vessel sought to be charged with a maritime lien as would have bound her under a contract of affreightment for transportation of the goods by her. See The James H. Prentice, 36 F. R. 777, 781, and cases cited; The Vigilancia, 58 F. R. 698, 700, and cases cited; The Cimbria, 156 F. R. 378.

In like manner, it had been held necessary, in order to establish an admiralty lien upon a vessel for maritime services rendered to her, that the services should appear to have been rendered to the particular vessel sought to be charged. Proof that they had been rendered under a contract with her owner for future services to a number of his vessels indiscriminately, at an agreed price per day or for the season, though including the particular vessel, was not accepted as sufficient for the purpose. The Newport, 114 F. R., 713; The Alligator, 161 F. R., 37. In the latter case it was said by the Court of Appeals for the Third Circuit:

> "A lien does not and should not attach for a supposed credit given to a vessel, unless the

services or supplies are clearly shown to have been rendered or furnished to the particular vessel to which credit is given."

The statute of 1910 has not, in our opinion, made proof that the supplies for which a maritime lien is claimed were furnished directly to the particular vessel by the material man any less necessary than before, nor does it afford any ground for attaching any meaning other than that previously recognized to the expression "furnished to a vessel." The decisions made since the statute was passed have insisted upon the same necessity and have given the same effect to the words quoted. See The Geisha, The Benthulia, 200 F. R. 865, 876; The Astor, etc., Co. vs. White, etc., Co., 241 F. R., 47; The Cora P. White, 243 F. R., 246.

The statute with which we are here concerned must thus be regarded as differing materially in its terms from State statutes purporting to give liens, —which may or may not be maritime liens,—for supplies or materials furnished "for" or "on account of" a vessel, or for materials furnished "in or about, or during, her construction," like the Maine statute considered in *The Kiersage*, 2 Curtis, 421, or the Massachusetts, Michigan and Virginia statutes refered to in *The Geisha*, 200 F. R., 865, 867, 868. In *Berwind-White, etc., Co. vs. Metropolitan, etc., Co.*, 166 F. R., 784; 173 F. R., 271, refered to in the opinion below, the Court of Appeals for this Circuit sustained liens claimed for machinery which had gone into each of two vessels respectively while being constructed under a single contract to furnish machinery for both, but which did not appropriate any of it specifically to either. The liens so sustained, however,

relating as they did to construction, were not maritime liens; nor were they asserted in an admiralty court. See 173 F. R., 480. The decision sustaining them, made in an equity suit, gave effect to a New Jersey statute with reference to which the machinery had been contracted for, which statute purported to secure by a lien any debt contracted by the owner of a vessel "on account of" any materials furnished "for or towards the building, repairing, furnishing or equipping such vessel." 166 F. R., 785. But the agreement here relied on must be taken to have had reference to the terms of the above Federal statute, and the parties to have understood that "the law would afford a lien" upon any one vessel of the Oil Corporation fleet for such coal only as might be "furnished to" her according to the accepted meaning of that expression. The question here is whether compliance with the terms of that statute is proved, not whether any underlying equity can be found which might support a lien in the libellant's favor.

We are unable to believe, in view of all the above, that the provisions of the statute can properly be understood in the less restricted sense accepted by the District Court, according to which, although the libellant had obtained no lien upon any vessel in the Oil Corporation's fleet when it parted with its coal by delivery to said corporation, liens in its favor might afterward be created by the Oil Corporation's subsequent acts in selecting particular vessels out of said fleet to receive portions of the coal which had been so delivered.

Where specific supplies or materials have been furnished to the owner upon a distinct understanding that they were for a specified vessel and the owner has, after delivery to him, appropriated

them to the vessel so designated between the parties, they have been held to have been furnished to her in the sense of the statute; and maritime liens for them under it have been sustained. *Ely vs. Murray, etc., Co.*, 200 F. R., 368; *The Yankee*, 233 F. R., 919.

The Court of Appeals for the Third Circuit was careful, in the case last cited, to limit its decision as follows:

> "We hold that a material man may make actual delivery of supplies to a vessel in the maritime sense, by causing them to be transported by rail and water carriers by interrupted stages from their point of origin to the vessel side, when the transaction is begun by a valid order indicating that the supplies are for the vessel and are to be delivered to her, and is completed by an actual delivery to the vessel consistent with the instructions of the order and the intentions of the parties giving and accepting it."

Further than this no Court had gone, in interpreting the provisions of the statute here in question, prior to the decision here appealed from. We are obliged to regard the construction adopted by the Court below as one not intended by the statute.

We, therefore, hold that the District Court erred in sustaining the liens asserted, upon the evidence before it. This conclusion renders it unnecessary to consider certain other errors assigned.

The decree of the District Court is reversed, and the cases are remanded to that Court, with instructions to dismiss the libels. The appellant in each case recovers its costs of appeal.

Supreme Court of the United States,

OCTOBER TERM, 1919.

No. [redacted]58

PIEDMONT & GEORGE'S CREEK COAL COMPANY,
Petitioner,

vs.

SEABOARD FISHERIES COMPANY,
Claimant, &c,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF AND ARGUMENT OF COUNSEL FOR PIEDMONT & GEORGE'S CREEK COAL COMPANY, PETITIONER.

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The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

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Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 211.

PIEDMONT & GEORGE'S CREEK COAL COMPANY, Petitioner, vs. SEABOARD FISHERIES COMPANY, Claimant, etc.	WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF AND ARGUMENT OF COUNSEL FOR PIEDMONT & GEORGE'S CREEK COAL COMPANY, PETITIONER.

STATEMENT.

(a) *Nature of proceedings.*

This case comes before this Court on a writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit to review a decree of that Court reversing a decree of the District Court of Rhode Island and remanding the case to said District Court with a direction to dismiss the libels. *Record,* p. 214.

The opinions in the Courts below are reported in the District Court *sub nomine The William B. Murray, et al.*, 240 Fed. Rep. 147, and in the Circuit Court of Appeals *sub nomine The Walter Adams, Seaboard Fisheries Company* vs. *Piedmont & George's Creek Coal Company*, 253 Fed. Rep. 20.

It is contended by the Petitioner, the libelant in the District Court and the prevailing party in that Court, that the decision of the Circuit Court of Appeals for the First Circuit (opinion written by Judge Dodge) places an erroneous and subversive construction on the Act of Congress of June 23, 1910, 36 Stat. 604*, governing Maritime Liens, rendering the Statute inoperative in an important class of cases it was intended to reach.

This case is a consolidated cause consisting of a series of libels brought by the Piedmont & George's Creek Coal Company, a Maryland corporation, hereinafter referred to as the Petitioner, against the fishing steamers *William B. Murray, Roland E. Mason, Herbert N. Edwards, Martin J. Marron, Amagansett, Walter Adams, Alaska, Ari-*

*Act of June 23, 1910, c. 373, 36 Stat. 604.

SEC. 1. Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel.

SEC. 2. The following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

SEC. 3. The officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser

zona, George Curtiss, Montauk, Quickstep, and *Ranger,* to recover the sum of $17,850.75 with interest, for coal furnished on the credit of the said fishing steamers at the request of their then owner, the Atlantic Phosphate & Oil Corporation, herein referred to as the Oil Corporation, during fishing season, 1914.

The coal in question had been furnished by the Petitioner in boat load lots for use by the Oil Corporation's steamers at two coaling stations of the Oil Corporation—one at Promised Land, New York, and one at Tiverton, Rhode Island—on an agreement that the Petitioner should have a lien therefor on all the vessels of the Oil Corporation's fleet. *Record,* pp. 16, 28, 54.

The first appearance of the Petitioner herein was by way of intervening libels or petitions in five libels theretofore filed against five vessels, the *Edwards,* the *Murray,* the *Marron,* the *Mason* and the *Amagansett,* which were then under arrest in libels brought by other parties and against which the Oil Corporation had requested the libelant to enforce its lien instead of libelling the whole fleet.

in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

SEC. 4. Nothing in this Act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this Act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed *in personam.*

SEC. 5. This Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings *in rem* against vessels for repairs, supplies, and other necessaries.

These five intervening libels came on for trial on June 14, 1915, and testimony was taken on that date in open court.

The five libels mentioned each contained two counts:

(1) for such share of the general lien indebtedness of the fleet of the libelant as the Oil Corporation had asked the libelant to enforce against the libelled vessels, and

(2) *for coal actually used by the particular vessel libelled.* *Record*, pp. 2, 3, 43, 118, 119, 146, 147, 170, 171, 193, 194, 216, 217.

During the progress of the trial the District Judge expressed a doubt as to the feasibility of holding five vessels for supplies furnished to vessels other than those libelled. *Record*, p. 44. The Petitioner, thereupon, libelled the seven other fishing steamers above mentioned which were the only other vessels of the fleet then within reach of process. *Record*, p. 1.

On June 21, 1915, on motion which was contested, leave was granted to the libelant to sever the intervening libels or petitions filed in the first five causes from their principal proceedings and to consolidate the said five petitions with the new libels. An appropriate order was duly entered in each of the five causes mentioned and in the new cause. *Record*, pp. 127, 153, 176, 199, 222.

Thereafter, pursuant to stipulation, the testimony which had been taken in the five libels was put into the consolidated cause together with certain additional facts and testimony. *Record*, pp. 55, 56.

The consolidated cause, therefore, consisted of libels against all the fishing vessels of the fleet of the Oil Cor-

poration which were available within the jurisdiction of the District Court when the proceedings were begun. *Record,* pp. 55, 56.

(b) *The facts upon which the action was founded.*

The facts of this case are not in dispute.

As stated by Judge Dodge at the outset of his opinion written for the Circuit Court of Appeals:

> "There is little or no dispute as to the material facts. They are for the most part sufficiently set forth in the opinion below. *The William B. Murray, et al.,* 240 Fed. Rep. 147."

The facts are quite fully stated also in the opinion of Judge Dodge. *The Walter Adams,* 253 Fed. 20. Much that is stated in Judge Dodge's opinion is, however, inaccurate in detail and in any event does not bear upon the construction of the Act of Congress and is therefore not material.

The facts upon which the Circuit Court of Appeals reached the determination which is here to be reviewed may be briefly stated:

The Atlantic Phosphate & Oil Corporation, a body corporate created under the laws of New York, herein called the Oil Corporation, owned and operated on the Atlantic Seaboard a fleet of 19 steam fishing vessels, of which 17 were actually in service at the time of the transaction involved in this litigation. *Record,* pp. 16, 21.

The fleet had its principal bases at Tiverton, Rhode Island, and Promised Land, New York, where factories of the Oil Corporation were located and where its vessels

came from time to time to take on coal and other supplies. *Record,* p. 21.

All the property of the Oil Corporation, including its fleet of vessels above mentioned, was subject to the lien of a mortgage to the Astor Trust Company as Trustee, securing an issue of bonds which were outstanding when the Oil Corporation and the Petitioner entered into the arrangement underlying the present proceeding. *Record,* p. 55.

The mortgage was foreclosed under a decree dated March 8, 1915, and the vessels were purchased by the claimant, the Seaboard Fisheries Company, at an equity sale in receivership proceedings, and consequently were subject to any valid maritime liens thereon held by the Petitioner. *Hudson* v. *New York & Albany Transportation Company et al.,* 180 Fed. Rep. 973, C. C. A. 2nd Circuit. *Record,* p. 56.

The maritime liens asserted by the Petitioner rest upon the following facts:

In February, 1914, the Oil Corporation was indebted to the Petitioner in the sum of $3,800 for which indebtedness, incurred in the summer of 1913, a note secured by bonds of the Oil Corporation was given. *Record,* pp. 15, 31.

At that time the Oil Corporation had between $75,000 and $100,000 of overdue accounts payable on its books owing to various creditors, which dated back to the previous year, and which it was unable to pay. *Record,* p. 15.

It was on the verge of a receivership and existed as a going concern only by the sufferance of its creditors. *Record,* pp. 15, 16. These facts were known to the Peti-

tioner, whose President had issued orders not to extend any further credit to the Oil Corporation. *Record,* pp. 15, 20, 21.

The Petitioner tried unsuccessfully to collect from the Oil Corporation the balance due for 1913. *Record,* p. 16.

The Oil Corporation had a total of nineteen fishing vessels in its fleet, all of which consumed coal, and it was necessary that coal be obtained in order that their vessels might continue in operation to secure fish for the manufacture of oil at the Oil Corporation's plants. *Record,* pp. 15, 16. They tried to obtain coal from the Petitioner by giving as collateral certain bonds of the Oil Corporation held in their treasury unsold, but the Petitioner was unwilling to make a contract based on the bonds as the only security. *Record,* p. 16.

Some time in the latter part of February or the early part of March, 1914, Mr. Bohannon, then the New York representative of the Petitioner, had a conversation with Mr. Meadows, Vice-President of the Oil Corporation, in the course of which Mr. Meadows told Mr. Bohannon that his understanding of the law was that the Oil Corporation had a perfect right to pledge the credit of the steamers, themselves, in order to obtain coal with which to operate them and that if the Petitioner would furnish coal the Oil Corporation would be willing to secure such deliveries by a maritime lien on all their steamers. *Record,* pp. 16, 17:

In this connection we quote the following from the testimony of Mr. Thomas C. Meadows, Vice-President and General Manager of the Oil Corporation, *Record,* pp. 16, 17.

> "Q. 15. Did Mr. Bohannon call on you any time during February 1914, in an attempt either

to collect this balance or make some working arrangements with you in regard to it?

Ans. He called regarding his account. I endeavored to make an arrangement with him for coal for the succeeding season.

Q. 16. Did you take up the question of coal for the season of 1914?

Ans. I did.

Q. 17. What did you offer him with regard to that coal, in your first proposition?

Ans. I told him that the company still had some of the bonds in its treasury such as had been pledged to secure his previous year's account, and on purchases for the year 1914 if he would be satisfied with those bonds as collateral we could give them as security.

Q. 18. What was Mr. Bohannon's reply to you? Did he have to refer back to some one?

Ans. He said he would refer it to Mr. Brophy, the president of the Company.

Q. 19. Did you afterwards see Mr. Bohannon?

Ans. Yes. Mr. Bohannon returned some two weeks later, I think, and reported Mr. Brophy was not willing to make a contract based on the bonds as the only security.

Q. 20. What further transpired?

Ans. I told him, as I understood the law, that we had a perfect right to use the credit of the steamers in the acquisition of coal and if he would be willing to furnish coal we would be perfectly willing that he hold and maintain a maritime lien on the steamers.

Q. 21. Was that of the entire fleet?

Ans. Yes; on all the boats.

Q. 22. Well, what happened thereafter?

Ans. He referred that to Mr. Brophy and Mr. Brophy accepted the proposition on that basis.

Q. 23. That was a maritime lien on your entire fleet should be security on which he was to furnish coal?

Ans. Yes.

Q. 24. That was your understanding of it?

Ans. That was my understanding of it".

No formal writing evidenced the undertaking, but subsequent letters were exchanged which referred to an agreement or understanding which conclusively proved that the matter was thoroughly understood by both parties. *Record,* pp. 17, 54, 57-60.

The agreement to furnish coal, therefore, was entered into upon the express understanding that for the coal furnished the libelant would get a maritime lien upon *all the steamers owned by the Oil Corporation.* Mr. Meadows further testified upon cross-examination as follows. *Record,* p. 24:

"Q. 109. And up to that time your agreement with the Piedmont Company had been that they should have a lien upon your vessels?

Ans. Upon all the vessels.

Q. 110. Up to that time no special vessels had been mentioned?

Ans. Yes, each had been mentioned.

Q. 111. Each of the 19?

Ans. Each of the 17."

Pursuant to the above arrangement and in reliance upon the Act of Congress, the Petitioner delivered to the Oil Corporation, primarily if not exclusively, for the use of its 17 fishing vessels then in service and in order to enable it to keep its said vessels at sea 5,320 tons of coal of the agreed value of $17,854.27. *Record,* pp. 37, 106.

Nine cargoes of coal were furnished by the Petitioner in pursuance of the above agreement (Record, p. 17). Of the nine shipments only two were paid for (Record, pp. 17, 39-40). These were the third and fourth shipments made under the agreement and the sum paid was $3,524.40 for 1,068 tons delivered at Promised Land. *Record*, p. 17.

For the first two cargoes shipped under this agreement notes were given, to which bonds of the Oil Corporation were attached as collateral. These notes were discounted at a bank by the Petitioner, thus permitting it to have the use of the money represented by the two cargoes. *Record*, p. 18.

The last five cargoes shipped under the above agreement contained the coal involved in the present case and were delivered in the months of May and June with specific dates for cash settlement stipulated. No notes were given and the cargoes were furnished solely on the agreement to give a maritime lien on the fleet as security. No part of the coal covered by these five shipments has been paid for. *Record*, p. 17.

When the bills for the last five shipments became due and were not paid, demand was made on the Oil Corporation and it earnestly requested that the Petitioner should not seek to enforce its lien against the vessels for a few days. The Petitioner complied with this request because it feared that any summary action on its part would result in insolvency of the Oil Corporation. *Record*, p. 18.

During this period of forbearance the Oil Corporation went into the hands of a receiver. *Record*, p. 19.

The coal was shipped at the expense of the Petitioner

by rail to railway terminal points at St. Georges, Staten Island, and Port Reading, New Jersey, where it was placed by the rail carrier upon barges for delivery to the Oil Corporation. *Record,* p. 64.

These barges were floated to Tiverton, Rhode Island, and Promised Land, New York, where the coal was dumped in the bins for distribution among the vessels of the Oil Corporation's fleet arriving from time to time to take on supplies. *Record,* pp. 28, 64.

The Petitioner did not control or direct the distribution of the coal, but merely undertook to replenish the bins at Tiverton and Promised Land on orders sent to it from time to time by the Oil Corporation, leaving the distribution among the vessels of the coal to the agency of the Oil Corporation, itself. Thus under date of June 16, 1914, the Oil Corporation writes to the Petitioner as follows. *Record,* p. 68:

> "We are just advised by our Tiverton plant that their supply of coal has been pretty well exhausted in starting the boats out and that they can use another cargo of about 700 tons whenever it suits your convenience to ship it to them. You may therefore consider this as an order for such a cargo when it is convenient for you to make the delivery".

Certain of the coal was used by vessels which the Petitioner was unable to serve with process and a relatively small amount was used in the Oil Corporation's boilers at Promised Land and Tiverton and as to that coal, it is conceded that the Petitioner either lost or failed to perfect its maritime lien; but the balance of the coal was duly dis-

tributed among and actually used by libelled vessels as follows. *Record*, pp. 106-111, 89-104:

Name of Vessel	Tons	Contract Price
Walter Adams	121.25	$408.16
Alaska	417.25	1,421.81
Arizona	35.00	114.80
George Curtiss	229.50	769.92
Montauk	177.50	608.76
Quickstep	19.00	62.32
Ranger	337.50	1,146.72
Herbert M. Edwards	429.00	1,390.72
Roland E. Mason	452.00	1,554.47
William B. Murray	406.75	1,389.95
Martin J. Marran	292.75	979.84
Amagansett	492.00	1,613.75
Total	3,509.50	$11,461.22

The District Court sustained the libels against the above mentioned vessels and awarded decrees for the value of the coal delivered to and used by each of them, the several decrees with interest and costs amounting as of November 1st, 1917, to $14,134.43.

There is no challenge of this evidence.

No question is raised as to the amount of coal delivered to each of the above named vessels, or as to the contract price therefor, or the sum due in respect thereof, except that a question is raised as to the application of $2,000 received by the Oil Corporation which the Claimant contends should be applied in reduction of the above indebtedness and which the Petitioner contends was rightfully applied in satisfaction of other indebtedness.

The facts in connection with this $2,000 payment will be hereinafter fully discussed.

(c) *Explanation of proceedings in the District Court.*

The invoices of the Petitioner for the coal sold and delivered as aforesaid were not paid when they fell due, whereupon Mr. Brophy, representing the Petitioner, came to New York for the purpose of enforcing collection by proceedings against the Oil Corporation's vessels. *Record*, pp. 23, 24.

He called to see Mr. Meadows, Vice-President of the Oil Corporation who persuaded him to delay action and the matter was held in abeyance until it became apparent that the Oil Corporation would pass into receivership. *Record*, p. 18.

Mr. Brophy then again conferred with Mr. Meadows "who prevailed upon him to exclude from his action he was threatening to bring as many of the boats as he was willing to exclude so that we (the Oil Corporation) might have something to operate with even though he tied up part of the fleet". *Record*, pp. 18, 19, 23, 24.

Both Mr. Meadows and Mr. Brophy were obviously of the opinion that the Petitioner, under the agreement in pursuance of which it had furnished the coal, had a joint and several lien against all vessels of the fleet and at Mr. Meadows' solicitation Mr. Brophy without waiving or intending to waive any lien or claim against the other vessels "selected the 5 best boats as ample security for his claim" and the amount due for the 5 cargoes of coal was apportioned on the records of the Oil Corporation among the 5 selected vessels arbitrarily and without regard to the amount of coal actually furnished to each vessel. Mr. Meadows testified on this point as follows. *Record*, pp. 19, 20:

"Q. 46. What was done in regard to making a record of the selection of these five boats as the boats against which the liens were to be impressed?

Ans. There was letters exchanged in which we specifically recognize our obligation and our agreement with these gentlemen that prior liens did exist, and those were selected as five boats that the liens should be enforced against if he saw fit to bring action, and in that letter there was some approximate statement as to the total amount of other liens that existed against these five boats.

Mr. Woolsey: Have you got the letter of September 11, our original letter, to the Atlantic Phosphate & Oil Company?

Mr. Thornley: Yes, sir.

Mr. Woolsey: May I have that? I will give you a copy in return. And there are also one or two other letters, Mr. Thornley—the letter of June 26th, the letter of July 15th.

Q. 47. Had you seen Mr. Brophy at New York prior to his writing you the letter in September, that you speak of?

Ans. Yes; I think he had been there.

Q. 48. Well, had there been any record made on your books as to the boats to be chargeable for these liens, the boats against which the liens were to be impressed?

Ans. There had been no singling out of vessels, nothing except the entire fleet had been referred to prior to his visit.

Q. 49. Then, what was done in regard to making a record as to these five boats against which the proceedings were to be enforced?

Ans. Well, following his conference it was agreed that he should have his invoices billed, one invoice against one of the five new boats which we recognized as the best boats.

Q. 50. Will you tell the Judge what happened, how this was done?

Ans. Mr. Bohannon came to the office with the invoices made out as Mr. Brophy and I had agreed they should be made out.

Q. 51. In the same proportion as contained in these libels?

Ans. Yes, just as they are in the libels. When we came to substitute them for the existing invoices which had already been rendered we found on the existing invoices the bookkeeper's notations, the stamps with the "O. K." with the different initials on them, and we realized that an effort would have to be made to reproduce those, but instead of doing that the bill heads were simply torn out and pasted to the original invoices.

Q. 52. Do you remember the date of this?

Ans. I think it was either the early part of September or the end of August".

In October, 1914, receivers were appointed for the Oil Corporation, and some months later the Petitioner filed intervening libels against five of the Oil Corporation's vessels, each of the libels containing two counts:

(1) a count for the value of coal allocated to the vessel on the books of the Oil Corporation, and

(2) a count for the value of the coal actually furnished to and used by the libelled vessel.

During the progress of the trial the District Court expressed a doubt as to the possibility of holding any one of the five vessels liable for coal not actually used by it, and thereupon the Petitioner libelled seven other vessels

of the fleet which were the only vessels then within reach of process.

All the libels were thereupon consolidated and proof was taken establishing with mathematical certainty the amount of coal actually furnished to each one of the twelve libelled vessels. *Record*, pp. 93, 95.

(d) *Decision of the Lower Courts.*

On proof of the amount of coal furnished to and used by each of the libelled vessels the District Court found no difficulty in sustaining each libel to the extent of the value of the coal so furnished. We quote the following from Judge Brown's opinion. *Record*, p. 77, 240 Fed., p. 152:

> "I find, therefore, that in contracting for this coal it was understood by both parties that it was to be principally used for strictly maritime purposes, that a large part of it was used for such purposes, and that the parties contracted in view of statutory rights to a lien.
>
> "It may be argued that when coal is delivered to bins on the wharf of a purchaser, who may use it as he pleases, on such of his ships as he may select, or upon land, if he prefers, that the coal is furnished to the owner and not to a vessel. But such an argument upon the evidence in this case ignores the material fact that it was understood by both parties that the coal was procured and supplied largely for uses which were strictly maritime.
>
> "Doubtless a very substantial part of the inducement to the Coal Company to supply the coal was its knowledge of its intended use by vessels for maritime purposes, and its understanding that the

law gave it a lien for coal supplied for such purposes. Upon the facts in this case it is most improbable that the coal would have been supplied to the owner and upon the owner's very doubtful credit.

"I find that it was furnished because it was destined and intended to be used in large part by vessels, and that in the sense of the statute it was therefor furnished to vessels upon the faith of a lien thereon, and not to the owner.

"The ultimate destination to vessels, and the use by vessels, being a material consideration, contemplated by both parties, it would be most unjust to the libelant to hold that it furnished the coal to the owner, and only on the owner's credit. The mere fact that the names of the particular vessels to receive particular shipments of coal were unknown I cannot regard as material. The Oil Corporation was known to be the owner of a fleet of vessels, and it was known that those vessels would call from time to time at the Oil Corporation's wharves for their coal. That is sufficiently certain which, in the due course of the contemplated supply of coal to the fleet would be made certain.

"The subsequent appropriation of the coal to particular vessels by the owner, being in pursuance of what was intended by both parties, logically relates to the question whether the coal was furnished by the libelant to a vessel. The course of the business of the owner's fishing fleet selected and made certain which of the vessels should receive the benefit of the libellant's coal and become subject to a maritime lien corresponding to the benefit received. A contract to provide coal for such vessel of a fleet as might first arrive in port, and the delivery of coal ready at the owner's wharf

for such vessel would become definite on the arrival of the first vessel of the fleet.

"As supplies for fleets of vessels under a common ownership and management in the ordinary course of business are contracted for in view of the general requirements of the entire fleet, as supply men will thus be called upon to furnish supplies in advance of the arrival of the vessels, as at the time supplies are ordered there may be uncertainty as to which vessel may require them and use them, the statute should receive a construction which will make it applicable to and consistent with modern business conditions. A supply man who furnished supplies ready for any vessel of a fleet that may call for it should not be deprived of the same right to a lien as a supply man who is told the name of the vessel which is to require the supplies.

"The appropriation of the coal to a particular vessel, though made by the owner, yet if done in pursuance of the course of business contemplated by the parties, must be regarded as completing a "furnishing" by the libelant to "a vessel", which is identified by the act of the owner in placing the coal aboard.

"Cases which hold that supplies may be furnished to a vessel, though not actually incorporated in or used by the vessel, have no bearing in this case. While use and appropriation may not, in all cases, be necessary to make out a case of furnishing to a vessel, it does not follow that they may not afford conclusive evidence of the identity of a vessel and of the completion of a maritime lien thereon.

"But the question of the effect of an appropriation to a particular vessel I regard as settled by the decisions of Mr. Justice Curtis and Judge Put-

nam, heretofore cited. In these cases it was at the outset uncertain which of two vessels might receive the supplies. In the present case it was uncertain which vessels of a fleet might receive them, but in this case, as in the cases cited, the uncertainty ended upon the owner's appropriation of the coal to special vessels.

"Following the decisions of Justice Curtis in *The Kiersage*, 2 Curt. 421, Fed. Cas. No. 7,762, and of Judge Putnam in *Berwind-White Coal Mining Co.* v. *Metropolitan S. S. Co.* (C. C.) 166 Fed. 784, I am of the opinion that for such coal as actually went into any vessels of the fleet the libelant is entitled to a maritime lien upon such vessel, but that there can be no lien upon one vessel for coal supplied to another vessel. See, also, *The Yankee*, 233 Fed. 919, 927, 147 C. C. A. 593."

The Circuit Court of Appeals reversed the decrees of the District Court because it felt compelled, apparently, on historical grounds, which it deemed of importance, to restrict the application of the Lien Act of June 23, 1910, to cases where the name of the vessel to which supplies are to be furnished and the extent of the supplies are known and specified in advance.

We quote the following from the opinion written by Judge Dodge, *Record*, p. 243:

> "Assuming that the libelant can be said, in the case of any one of the vessels, to have 'furnished to' her the coal she received, in the statutory sense, the furnishing may be said to have been 'upon the order of her owner'. But the question is, whether any such assumption can be made, in view of the facts that after turning over to the

owner of the fleet the entire quantity of coal shipped as above, the libellant left it wholly to the owner to select, out of the fleet, the particular vessels by which the coal was to be received and used; and to determine the particular part of said quantity to be put on board each vessel, as well as the particular time for putting it on board.

"The Federal statute enlarged the maritime law as it has previously stood, by permitting the acquirement of maritime liens upon vessels, for supplies furnished to them, as well in their home ports as in foreign ports. This it accomplished by providing that proof of furnishing such supplies to a vessel should be sufficient proof of credit given to the vessel therefor,—definite proof of credit so given having always previously been held necessary, whenever what had been furnished had been furnished at the port of the owner's residence. We see no reason to believe that the statute intends the same result to be accomplished without proof that the supplies for which a lien is claimed have been furnished directly to the vessel, and not merely furnished to the owner without definite and distinct reference to her."

These two quotations indicate the point where the views of Judge Brown and Judge Dodge diverge.

They also indicate the underlying question now presented to this Court:

Is the Petitioner to be deprived of its lien and its decrees undermined for the benefit of the purchaser of the vessels at foreclosure sale, who acquired the vessels with full knowledge of the facts, merely for the reason that the Petitioner did not do the impossible and indicate in advance of the delivery of the coal at the Oil Corpora-

tion's bins the name of each vessel to be supplied with coal and the amount to be appropriated to her?

It is urged by the Petitioner that such a construction is out of line with previous well considered judicial decisions and so limits the Act of Congress that it is wholly unavailable as a source of credit to corporate and other ship owners operating fleets of vessels.

FIRST POINT.

THE ACT OF JUNE 23, 1910 AFFORDS A MARITIME LIEN FOR SUPPLIES FURNISHED TO A VESSEL AND WHERE COAL IS DELIVERED TO THE OWNER OF A FLEET OF VESSELS FOR DISTRIBUTION AMONG THE VESSELS OF THE FLEET UPON AN EXPRESS STIPULATION THAT THE DELIVERY IS MADE UPON THE CREDIT OF THE VESSELS AND NOT UPON THE CREDIT OF THE OWNER A LIEN ATTACHES TO EACH VESSEL FOR THE COAL ACTUALLY DISTRIBUTED TO AND USED BY IT.

The Act of Congress of June 23, 1910 (36 Stat. 604, chapter 373) printed in full in a foot-note on page 2, provides that,

> (§ 1) "Any person furnishing * * * supplies * * * to a vessel, whether foreign or domestic upon the order of the owner or owners of such vessel * * * shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem* and it shall not be necessary to prove that credit was given to the vessel".

In the case at bar the Oil Corporation, the bankrupt owner of a fleet of 19 steam fishing vessels ordered from the Petitioner for the purpose of keeping its fleet in operation five cargoes of coal, valued at $17,854.27.

By the express terms of the Act of Congress there is a presumption that the coal so furnished to the vessels was furnished upon the credit of the vessels and not upon the credit of the owner. But the Petitioner does not rest its case upon any mere statutory presumption. It refused to deliver any coal on the credit of the owner; it declined to accept the Oil Corporation's proposal that it accept a note secured by mortgage bonds as collateral, and finally consented to deliver the coal solely upon the credit of the 17 vessels of the fleet then in service and under an express agreement made by the Vice-President and Manager of the Oil Corporation, whose authority has not been questioned, that it should have a maritime lien on these vessels therefor.

The Circuit Court of Appeals has held, however, that notwithstanding the statutory presumption and the express agreement of the parties, no maritime lien attached under the Lien Act for the reason—and we again quote directly from the opinion of Judge Dodge—that,

> "After turning over to the owner of the fleet the entire quantity of coal shipped as above, the libelant left it wholly to the owner to select out of the fleet the particular vessels by which the coal was to be received and used; and to determine the particular part of said quantity to be put on board each vessel as well as the particular time for putting it on board."

Reduced to a simple analysis the decision of the Circuit Court of Appeals holds that a supply man who furnishes his supplies to a vessel *through the agency of the owner of the vessel* cannot under any circumstances have a maritime lien on the vessel for the supplies.

A stronger case of right to a lien than that shown here cannot well be imagined.

The Petitioner asked for a review of the decision of the Circuit Court of Appeals on the ground among others, that it is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *The Yankee*, 233 Fed. 919.

In *The Yankee*, the dredge *Yankee*, chartered to a dredging company, was being used by it in dredging in the Delaware River below Philadelphia. The libelants furnished supplies on orders of the dredging company containing shipping directions pursuant to which the supplies were forwarded by rail and other carriers to a designated wharf in Philadelphia, from which they were taken from time to time by the dredging company to the dredge where it was at work. Whether *The Yankee* was specifically mentioned by name in the orders does not appear. Certain of the supplies went to and were, however, used by *The Yankee*.

It was held that such supplies were "furnished * * * to a vessel", within the meaning of the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604 (Comp. St. 1913), relating to maritime liens, and that under that Act one furnishing supplies for a vessel on proof of

1. an order therefor from the owner or from a person

to whom the management of the vessel has been lawfully entrusted at the port of supply and

2. of the fact that the supplies reached the vessel, has the right to a maritime lien on her.

Circuit Judge Woolley, delivering the opinion of the court, said at page 927:

> "With respect to the claim of the last named libelant, which grew out of a contract to supply coal for the whole fleet, we are satisfied that in giving the order, the quantity to be supplied to and daily consumed by the *Yankee*, was mentioned and considered by the parties, and that of the total amount of coal supplied, a definite portion was appropriated for and furnished to the *Yankee* within the rule of law applicable in such cases. *The Kiersage*, Fed. Cas. No. 7762; *The Murphy Tugs* (D. C.), 28 Fed. 429; *McRae* v. *Bowers Dredging Co.* (C. C.), 86 Fed. 344".

While the Circuit Court of Appeals in the opinion in the present case written by Judge Dodge, does not directly question the decision in the case of *The Yankee*, it is evident that Judge Dodge regarded the case as having been erroneously decided and was unwilling to be guided by the principles underlying it.

He refers to the opinion in *The Yankee* as going further than that of any other Court in interpreting the provisions of the Act of Congress, but makes no effort to distinguish the case of *The Yankee* from the instant case, other than to note that in the case of *The Yankee* where, as in the present case, coal was contracted for by the operating owner for the use of a fleet of vessels *The Yankee* was specifically named as one of the vessels of the fleet, and it was understood that a specified amount of the coal

so contracted for in the name of the owner was for the use of *The Yankee.*

We doubt the correctness of Judge Dodge's interpretation of the opinion in the case of *The Yankee.*

It does not appear from the opinion that *The Yankee* was in fact specifically mentioned by name in the negotiation of the contract, or that she was identified otherwise than as one of the units of the fleet for which the coal was purchased. Neither does it appear as we read the case that the exact amount of coal intended for the use of *The Yankee* was definitely fixed and specified, all that the opinion discloses on this point is that *"the quantity to be supplied and daily consumed was mentioned and considered by the parties".*

Clearly the libelant in *The Yankee* had done precisely what the Petitioner did in the present case. He sold a large quantity of coal to the owner of the fleet for the indiscriminate use of the vessels of the fleet and delivered the coal to the owner on the credit of the maritime lien on the vessels afforded by the Act of Congress, and left it to the agency of the owner of the fleet to make delivery of the coal to *The Yankee* and other vessels of the fleet, and to make the apportionment among them from time to time on the basis of their respective requirements and not on the basis of any specific allotment agreed upon at the time the coal was delivered to the owner.

We contend that upon the actual facts the cases are parallel.

Even assuming, however, that Judge Dodge correctly states the facts disclosed in the case of *The Yankee,* it is still evident that in principle the two cases cannot be distinguished.

There is no substantial reason why the name of the vessel should be specified; it ought to be sufficient if the vessel is identified with reasonable certainty as Judge Brown suggested in the District Court, and we submit that it is so identified when it is mentioned as one of the units of the fleet. Neither can we perceive any substantial reason why the "exact quantity" of coal to be furnished to any one of the vessels of the fleet should be indicated prior to the delivery of the supply to the owner; on the contrary, there are important practical reasons why the apportionment should be left to the agency and discretion of the owner. We quote in this connection from the opinion of Judge Brown. *Record*, p. 77:

> "As, supplies for fleets of vessels under a common ownership and management in the ordinary course of business are contracted for in view of the general requirements of the entire fleet; as, supply men will thus be called upon to furnish supplies in advance of the arrival of the vessels; as, at the time supplies are ordered there may be uncertainty as to which vessel may require and use them, the Statute should receive a construction which will make it applicable to and consistent with modern business conditions. A supply man who furnished supplies ready for any vessel of the fleet that may call for it should not be deprived of the same right to a lien as a supply man who is told the name of a vessel which is to require the supplies".
>
> "The appropriation of the coal to a particular vessel though made by the owner, yet, if done in pursuance of the course of business contemplated by the parties, must be recorded as completing 'a furnishing' by the libelant to 'a vessel' which is identified by the act of the owner in placing the coal aboard."

That the movement of vessels is necessarily uncertain is not the only fact to be considered.

Ship owners purchasing supplies for fleets of ocean going vessels or for the cargo carriers of the Great Lakes or even for smaller fleets of trawlers and fishing vessels, can no longer depend on the stocks on hand in the ship chandleries along the water front, as was the practice at the time of the early decisions referred to by Judge Dodge. This is especially true of coal supplies.

Practically all supplies are now purchased in large quantities directly from the manufacturer or producer; and coal, the vital factor in the supply service of every great shipping concern, is often purchased directly from the mine owners.

Coal and fuel oil which originate at interior points are brought to tidewater and lake ports through the agency of rail carriers and the deliveries to the consignee are dependent on car supply, coal production, weather conditions, and a variety of other circumstances, and consequently are uncertain.

Accordingly, the ship owner, unless his vessels are to be detained in port to await the uncertain arrival of supplies and unless railway equipment is to be detained on sidings to await the uncertain arrival of vessels, is often obliged to maintain extensive storage plants at the bases where the vessels take on supplies.

Purchases are made months in advance of the approximate dates for the delivery of the supplies by the rail carriers and cannot, in the nature of things, be made in the name of a particular vessel or for the requirements of a particular vessel and frequently cannot ultimately be delivered to a particular vessel, otherwise than through

the agency of the ship owner, without disruption and disorganization of the ship owner's arrangements.

It is, of course, manifestly to the interest of the public, especially under prevailing economic conditions, that all storage plants and facilities be utilized and that large purchases of supplies be made at such times and in such manner as will permit intensive employment of railway equipment by rail carriers engaged in transporting the nation's commerce. It would be intolerable either to detain a vessel in port to await the arrival of coal, or to detain railway equipment upon a siding to await the arrival of a vessel. Yet, these results are inevitable if parties contracting to buy and sell supplies are required by reason of a narrow construction of the Lien Act, either to surrender the benefit of the Lien Act or to revert to the business conditions of an earlier century.

The case of the Petitioner is one of unusual hardship.

The Petitioner parted with its coal solely upon the security of the lien given by the Act of Congress.

The Petitioner's coal was actually delivered to and used by the libelled vessels to the amount for which the lien was allowed against each of them.

By the use of the Petitioner's coal the vessels were kept in operation, contributing earnings to the Oil Corporation and its creditors, including the Seaboard Fisheries Company, the claimant herein, which under foreclosure proceedings, purchased the libelled vessels with knowledge that the Petitioner asserted a maritime lien against them for coal unpaid for although actually delivered to, and used by, the vessels.

A maritime lien under such conditions is sustained

by the weight of authority both prior to and subsequent to the passage of the Act of June 23, 1910.

In *Berwind-White Coal Mining Co.* v. *Metropolitan SS. Co.*, 1908, 166 Fed. 782, affirmed by this Court, 173 Fed. 471, an intervening petition was filed seeking to have liquidated and allowed certain claims for work and material furnished on two steamers as a part of their original construction, and Judge Putnam held that where a joint contract provided that payments should be made to the contractor for labor and materials furnished for the construction of several vessels under the statutes of New Jersey, there was no inherent difficulty in determining the amount to be paid for labor and materials which went into each vessel, nor in apportioning the lien accordingly on each vessel.

Judge Putnam further held that it was not essential to the validity of a lien given by a state statute on a vessel for labor or material furnished in its construction to prove that the labor or material was furnished on the credit of the vessel, where the statute does not in terms require such proof.

He said at page 784 (Italics ours):

> *"The underlying equity is that the lien is supported by the fact that the labor and materials have actually gone into the property on which the lien is claimed, and increased its value."*

In *The Kiersage*, 1855, 2 Curtis, 421, 14 Fed. Cas. 466, it was held that a law of Maine similar in purport to the Lien Act did not give to material men a lien on one vessel for supplies and materials furnished both for it and for another vessel though both were of the same size and

model, but that the lien attached for such supplies as were actually used in the vessel against which proceedings were pending.

Mr. Justice Curtis, who delivered the opinion of the Circuit Court, used the following language, at page 467 (Italics ours):

> "At the same time, I think that where materials are furnished for two specific vessels, though the original contract does not appropriate them specifically to either, yet when they are afterwards appropriated, they may properly be considered as furnished for that vessel, in the construction of which they are used. *The effect of such a contract is to enable the builder to elect, to which of the two vessels he will appropriate them.* When he has made that election and actually appropriated them or some part of them to one vessel, I can see no sound reason, why it may not be said with truth, that they were furnished for and on account of that vessel, and so, that the case is within the terms of the law."

As Judge Brown remarked in his opinion below, this language "seems to be directly applicable to the case before us". *Record,* p. 76.

In *The Cora P. White,* 1917, 243 Fed. 246, which was a libel against a fishing vessel, one of the libelants claimed a maritime lien for coal furnished to the vessel. While the District Court decided that no maritime lien existed for the coal furnished, the sole reason for that decision was that the coal was furnished to the owner company without mention that the coal was intended for use on a

vessel. District Judge Rellstab said at page 249 (italics ours):

> "The Act of June 23, 1910, extended said lien to domestic vessels, and made it unnecessary to allege or prove that credit for the supplies, etc., was given to it, but it did not obviate the necessity to allege and prove that said supplies were in fact furnished to the vessel. *This does not mean that the materialman must personally see that the goods are actually put on the vessel.* If the supplies are furnished on the orders of the person to whom its management has been lawfully intrusted at the port of supply, and which pursuant to the orders of such person were forwarded in the manner indicated to a designated place, from which they were taken by such person to the vessel where it was at work, such supplies are furnished to it within the meaning of the act of 1910. *The Yankee* (C. C. A. 3), 233 Fed. 919, 147 C. C. A. 593.
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> Nor did this act change the law that a lien does not exist when the supplies are furnished on the mere credit of the owner. *Ely* v. *Murray & Tregurtha Co.* (C. C. A. 1), 200 Fed. 369, 118 C. C. A. 520. The agreement or understanding as to whether credit was given to the vessel, or the owner alone, may be inferred from acts and circumstances as well as from express language. *Cuddy* v. *Clement* (C. C. A. 1), 115 Fed. 301, 53 C. C. A. 94; *The Lucille* (D. C.), 208 Fed. 424.
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> "No case has been cited, and none has been found, where a maritime lien has been allowed, where the supplies were furnished on the order of the owner, which did not indicate that they were for a vessel's use, because the goods or some of them were subsequently used on said vessel. There are cases which sustain such a lien where the

goods or services were ordered for several vessels, and all of the goods or labor were actually furnished or rendered to said vessels. *The Kiersage*, Fed. Cas. No. 7762; *The Murphy Tugs* (D. C.), 28 Fed. 429; *McRae* v. *Bowers Dredging Co.* (C. C.), 86 Fed. 344; *The Yankee* (Claim of the Glen Brook Coal Co.), *supra*. In these cases the value of the supplies and services was proportioned and liens allowed on said vessels respectively".

The principles applied by Judge Arthur Brown in the present case were also applied in the often cited cases of *The Murphy Tugs*, 28 Fed. 429, and *McRae* v. *Bowers Dredging Co.*, 186 Fed. 344.

In *The Murphy Tugs*, 1886, 28 Fed. 429, the libelant made a contract with the president of a tug boat company to serve as a diver and engineer and was to be paid at the rate of $10 a day and to work on any vessels of the company as ordered. In dealing with this and sustaining the liens, Mr. Justice Brown, then District Judge in Michigan, said at page 430 (italics ours):

> "The difficulty in this case arises from the fact that the contract between the libelant and the Tug and Transit Company was not for services upon any particular tug, but for services upon any tug owned by the company to which he might be ordered. I doubt if this circumstance varies in any way the principle applicable to this class of cases if his services are paid by the day, and *are therefore capable of apportionment*. While the services may not be actually rendered upon the tug, he is for the time being a part of the equipment of such tug, and entitled to a lien upon her, upon the principle announced by this court in the case of *The Minna*, 11

Fed. 759, in which I had occasion to hold that all hands employed upon a vessel, except the master, were entitled to a lien, if their services were in furtherance of the main object of the enterprise in which she was engaged. In this case a lien was sustained in favor of persons employed upon a fishing tug, solely for the purpose of catching and preserving fish, notwithstanding the fact that they took no part in the navigation of the vessel, and that an incidental portion of their duties was performed on shore".

"*To deny the libelant a remedy by lien is virtually turning him over to a personal claim against an insolvent corporation.* While the case is a somewhat doubtful one, I am inclined to allow the claim."

McRae v. *Bowers Dredging Co.*, 1898, 86 Fed. 344, which cited *The Murphy Tugs*, at page 347, was an equity case in which the defendant was an insolvent corporation whose property was in the hands of a receiver.

The intervening creditor in question had furnished necessary supplies and materials for repairs to defendant's vessels and machinery.

Among the supplies furnished was coal consumed by two vessels, which was furnished upon the request of the general manager. This coal was necessary to enable the defendant's dredges to work.

The evidence showed that the general manager did not have money to pay for or means to procure this coal otherwise than upon the credit of the dredges. The Court held that this evidence was sufficient together with evidence that it was furnished at the manager's request in scows, from which it was received on board the dredges as re-

quired for use, to raise a conclusive presumption of necessity for using the credit of the vessels and to result in the creation of maritime liens. *The Grapeshot,* 9 Wall. 129-145; and *The Lulu,* 10 Wall. 192, 204, were cited.

The Court further held that where persons were employed on and coal furnished to two or more vessels and the evidence shows the time which each man devoted to the service of each vessel and the amount of coal used on each, the amounts will be fairly apportioned between the vessels and as a court of equity it enforced preferential claims based entirely on maritime liens against the estate.

The Court said at page 348 (italics ours):

> "All of the coal consumed by both vessels while engaged in the work was purchased of the intervenor C. J. Smith, as receiver of the Oregon Improvement Company. The evidence shows that the defendant is a corporation organized under the laws of the State of Illinois. Its president and general officers, except a general manager, were not inhabitants of this state, and it had no general office in this state while the work referred to was being done. The coal was furnished upon the request of the general manager, and was delivered in scows, from which it was received on board the dredges as required for use. *The evidence shows the average daily consumption of each of the dredges, and the number of hours each was in operation, and from this data a close estimate of the amount supplied to each can be ascertained, and a fair apportionment made, so that the liens upon each vessel will not be for a greater amount than the price of the coal which she consumed.*"

While it is true that certain of the above decisions were rendered under state statutes we fail to perceive, in view of the wording of the Lien Act, any substantial basis for distinguishing them or questioning their authority.

Especial reliance is placed upon the decision in *The Kiersage*, 2 Curtis 421.

The Maine statute involved in that case allowed a lien for supplies *"furnished to or for account of a vessel."*

A quantity of supplies were delivered to the owner of two vessels who was permitted by the supply man to apportion them among the two vessels—in the language of Judge Dodge, it was left to the owner "to determine the particular part of said quantity to be put on each vessel as well as the particular time for putting it on board". *Record*, p. 243.

Judge Curtis upheld the lien on the express ground that the several quantities apportioned to each vessel by the owner were "furnished to" the vessel by the supply man. This is precisely the language used in the Act of Congress of June 23, 1910, which is under consideration here.

SECOND POINT.

THE LIEN ACT WAS INTENDED TO BROADEN AND INCREASE THE SECURITY OF PERSONS FURNISHING SUPPLIES TO VESSELS, NOT TO NARROW OR CIRCUMSCRIBE IT, AND HENCE SHOULD HAVE AN ENLIGHTENED CONSTRUCTION TO MEET MODERN NEEDS.

In *The Oceana*, 1917, 244 Fed. 80, which was a consolidated libel to enforce maritime liens against the

Oceana, the main question was that of notice. It was held that all persons furnishing supplies, whether before or after formal delivery of a vessel from the ship repairer to her owner, without knowledge or notice of the contract of sale, were entitled to liens therefor. Judge Ward, who delivered the opinion of the Court of Appeals for the Second Circuit, discussed the nature and purpose of the Lien Act, and showed that its purpose was to increase not to limit the material man's security by way of lien. He said at page 82:

> "Obviously the act was passed in restriction of the rights of vessel owners and in the aid of those who furnish repairs, supplies, and other necessaries. It wiped out all difference between foreign and domestic vessels, and between repairs, supplies, and other necessaries furnished in the home port, as distinguished from those furnished in foreign ports, and between such as were ordered by the master and such as were ordered by the owners. It created a presumption of law of the vessel's liability for all repairs, supplies, and other necessaries ordered by the master, managing owner, ship's husband, charterer, any person to whom the management of the vessel is intrusted at the port of supply, owner *pro hac vice*, and conditional vendee."

THIRD POINT.

IT IS NOT NECESSARY IN ORDER TO IMPRESS A MARITIME LIEN ON A VESSEL THAT THE SUPPLIES BE ACTUALLY DELIVERED ON BOARD THE VESSEL BY THE PERSON WHO SUPPLIES THEM.

If supplies are brought within the immediate presence or control of a ship, the vessel, of course, is bound. *Ammon* v. *The Vigilancia*, 1893, 58 Fed. 698.

In *D. & H. Canal Co.* v. *The Alida*, 1857, 23 Betts D. C. Mss. 139, 7 Fed. Cas. 399, which was a libel for fuel furnished, Judge Betts, in giving a decree for the libelant, held that a lien on a steamer for fuel arises upon a delivery thereof on a wharf nearby in pursuance of the orders of her officers.

In *The James H. Prentice*, 1888, 36 Fed. 777, Sanborn, sole owner of a barge, contracted with one Beaudry to repair and improve her. While the work was going on he agreed to sell a half interest in her to Kelly, and further authorized Kelly to superintend the work and to settle the bills therefor. He subsequently conveyed to Kelly his half interest. Libelants, knowing nothing of the contract with Sanborn and Kelly, and supposing Kelly to be a part owner, furnished lumber to the contractor Beaudry, which Kelly inspected and promised to pay for. It was held that Sanborn had so conducted himself as to lead libelants to believe that Kelly was authorized to bind the vessel, and that they had a lien for the amount of their bill.

It was further held that under a statute giving a lien

for material furnished in and about the building and repairing of water craft, it is sufficient to show that the materials were ordered for and delivered to or near the vessel though it appeared that a part of them were subsequently used for other vessels, and that the act did not require proof that the materials were actually incorporated in the vessel sought to be charged.

FOURTH POINT.

IT IS SETTLED LAW THAT AN OWNER MAY BY AGREEMENT, EXPRESS OR IMPLIED, CREATE A MARITIME LIEN ON HIS VESSEL FOR SUPPLIES FURNISHED.

In *The Kalorama*, 1869, 10 Wall. 208, which was a libel for advances ordered by the owner for repairs and supplies to the steamer, the District Court held that the advances were a lien upon the steamer. The Circuit Court held that the advances constituted the mere personal debt of the owner. The Supreme Court reversed this decision and affirmed the decree of the District Court.

Mr. Justice Clifford said at page 214:

> "Implied liens it is said can be created only by the master, but if it is meant by that proposition that the owner or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the Court cannot assent to the proposition as the practice is constantly otherwise."

In *The Cimbria*, 1914, 214 Fed. 128, it was held that under Act June 23, 1910, one advancing money to pay claims for repairs, supplies, etc., furnished to a vessel, is

presumed to have made the advances on the credit of the vessel, and such presumption is not overcome by his taking the owner's note and a mortgage on the vessel.

In *The Alaskan,* 1915, 227 Fed. 594 (C. C. A. 9th Circuit), it was held that, under the Washington State Code § 1182, which gives a lien on a vessel for repairs made at the request of the owner, agent, etc., although there must be some evidence that the repairs were furnished on the credit of the vessel, such evidence need only be slight. It was held that the uncontradicted evidence of the repairer that he relied on the credit of the vessel, and that he had previously made repairs for the same owner, charged the same to the vessel direct, and rendered the bills so charged to the owner, is sufficient.

In *The George Dumois,* 1895, 68 Fed. 926 (C. C. A. 5th Circuit), coal was furnished by libelant at Mobile, Ala., to the ship G. upon the personal order of one D., the president of the C. Company, the charterer of the ship. The C. Company was a Louisiana corporation and D. a resident of New Orleans. Apparently neither had any property at Mobile. The ship was not in a port of distress, but was running regularly between Mobile and foreign ports. No reference was made to the vessel as a source of credit when the coal was ordered, but it was received by the master and used in prosecuting a voyage which could not have been made without it, and it was charged on libelant's books to the ship. It was held that libelant had a lien on the ship for the price of the coal.

The Court in *The George Dumois* held that where

necessary supplies are furnished to a ship in a foreign port, and are received by the master and used in the service of the ship, a maritime lien results, unless it is shown that the furnisher of the supplies relied on the credit of the owner and not of the ship. It was held that the burden of showing such fact, to defeat the lien, rests on the ship and her claimants.

In *The Fortuna*, 1914, 213 Fed. 284, it was held that articles furnished on the order of the master and representative of the owner to supply the slop chest of a vessel about to sail on a season's fishing trip of four or five months' duration, are "supplies or other necessaries" within the meaning of the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604, for which such section gives a lien on the vessel.

The recent decision of the Circuit Court of Appeals for the Ninth Circuit in *The South Coast*, 247 Fed. 84, indicates the strength of the presumption that supplies are furnished on the vessel's credit.

In that case there was a charter of a ship with option to purchase and the owner reserved only the right to appoint the master who was to be paid by and be under the orders of the charterer. It was provided that the owner might withdraw the vessel on failure of the charterer to pay the charter hire or to discharge any liens within thirty days after they accrued, and that the charterer should hold the owner harmless from all liens or demands against the vessel created during the charter term.

It was held that the provision for this indemnity did not negative the authority of the charterer to procure

supplies on the credit of the vessel, but, on the contrary, rather implied such authority, and that any one who, in good faith, furnished the necessary supplies on the master's order on the credit of the vessel was entitled to a lien therefor, although the owner had notified him not to furnish the supplies.

In a very interesting opinion, Judge Wolverton points out that the owner's attempt to prevent the libelant from advancing supplies on the credit of the vessel was really an invasion of the charterer's rights under the charter and was unavailable to subvert the master's authority in the premises.

Judge Wolverton said at page 88:

> "Now, coming to the instant controversy: The repairs and supplies in question were furnished on the order of the master. The master, who was appointed by the owner, was obliged, under the charter party, to take his directions from the charterer. The libelant was apprised of the existence of the charter party, and was warned by the owner not to furnish supplies on the ship's credit. The libelant, nevertheless, furnished the supplies, with the declaration to the owner's representative that he would not furnish them in any other way, or under any other conditions, than upon the credit of the ship.
>
> "It is the purpose of the statute, as it was the purpose of the law previous thereto, that the furnisher of such commodities as are necessary to enable a ship to enter upon or pursue her voyage, and to engage in maritime traffic, to which only she is adapted, shall have a lien on the ship therefor. It is in the interest of shipping, conducted upon maritime waters, that such should be the case,

as otherwise credit would not be extended, upon the account of the owner or master alone, to enable the ship to discharge its peculiar function, and great inconvenience would follow, to the detriment and disadvantage, if not the ultimate disaster, in large measure, of maritime shipping. Many ships sail under charter, either verbal or in form of regularly drawn charter parties, and it is usual and customary for the charterer in either event to disburse the necessary expenses of the ship; and of this all persons furnishing supplies, etc., to a chartered ship must be deemed to have notice. But notwithstanding this notice, or even knowledge that the ship is under charter, we cannot believe that it was the intendment of the statute or of the law that the furnisher should, because of that fact, be deprived of his lien when advancing necessary repairs or supplies in good faith to enable the ship to engage in her accustomed traffic. Nor do we believe that it was the intendment of the statute or of the law thus to impose so vital a hindrance upon maritime shipping, and unless there is something more in the charter party, that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon, the master's ordinary authority is not impaired or abbreviated; nor can the right of the furnisher of repairs, etc., to extend credit to the ship, and his consequent lien, be so subverted.

"The terms of the present charter party as respects the furnishing of repairs, supplies, etc., are only those usual to most charter parties, and by reason of the provision that the charterer will hold the owner harmless from all liens against the vessel, there is an implication of authority on the

part of the charterer to incur such expenses on the credit of the vessel. True it is that the owner attempted to prevent the libelant from advancing the supplies on the credit of the vessel; but this was an invasion of the charterer's rights under the charter party, and was unavailing to subvert the master's authority in the premises. As bearing upon the proposition, in addition to *The Surprise, supra*, see *The Philadelphia*, 75 Fed. 684, 21 C. C. A. 501."

Even though there had been no express agreement furnish coal for specific ships the circumstances such that this Court should imply an agreement create a lien on the particular ships which ually used the coal for the coal used by each. *The apeshot*, 1869, 9 Wall. 129; *The Ella*, 1897, 84 Fed. 471, ; *The Worthington*, 1904, 133 Fed. 725; *The Kalorama*, 9, 10 Wall. 208; *The Emily Souder*, 1873, 17 Wall. 666; *Valencia*, 1896, 165 U. S. 264, 271; *The Patapsco*, 1, 13 Wall. 329; *The Havana*, 54 Fed. 201; *The Newt*, 1901, 107 Fed. 744; 114 Fed. 713.

FIFTH POINT.

AGREEMENTS FOR A GENERAL LIEN SUCH AS WAS HERE OWN HAVE FREQUENTLY HAD JUDICIAL APPROVAL AND E FACT THAT THE SUPPLIES HAVE BEEN FIRST CHARGED THE OWNER ON THE SUPPLIER'S BOOKS HAS BEEN HELD MATERIAL.

In *The Patapsco*, 1871, 13 Wall. 329, coal was ordered by the owners under a general contract for all ir vessels. Part of the coal was delivered on board

the *Patapsco* at a foreign port. The facts showed that the owners of the vessel did not have good credit and that the Coal Company was aware of this fact, and that the Coal Company looked to the vessels as security.

The Court held that a maritime lien existed for the value of coal supplied, unless it was shown that the master had funds or the owners had credit. *It was also held that an entry in the ledger charging coal to owners was not sufficient to show that credit was given owners personally.*

Mr. Justice Davis delivered the opinion of the Court and said at page 333:

> "It would be strange if the libelant did not know this condition of things and in the absence of proof on the subject, it is a reasonable inference that he did. If he had this knowledge it would be a violent presumption to suppose that he relied on the credit of the company at all for the supplies which he furnished."

To the same effect is the case of *Lower Coast Transportation Company* v. *Gulf Refining Co.*, 211 Fed. 336, decided by the Circuit Court of Appeals of the Fifth Circuit.

In the present case it is admitted that the Petitioner had knowledge of the Oil Corporation's shaky financial condition. As Judge Brown said in his opinion in the case at bar, at page 75 of the record:

> "It may be said, therefore, that the parties contracted knowing that a large portion of the coal was to be used for a strictly maritime purpose, and in reference to such legal rights as existed under the United States statute."

In *The Patapsco*, 13 Wall. 329, Mr. Justice Davis said at page 334:

> "If the credit was to the vessel there is a lien, and the burden of displacing it on the claimant. He must show, affirmatively, that the credit was given to the company to the exclusion of a credit to the vessel. This he seeks to do by the form of charge in the libelant's journal and ledger. If it be conceded that these entries tend to support this position, they are far from being conclusive evidence on the subject. Entries in books are always explainable, and the truth of the transaction can be shown independent of them."

In certain phases that case is square with the facts in the case at bar. Here the bookkeeper merely charged the shipments as they were made into the general running account of the Oil Corporation even though both he and the officers of the Coal Company knew that the coal was furnished on the credit of the steamers for which the coal was intended. The change in the method of charging the coal was made at the Oil Corporation's request and in view of that fact is not subject to any just criticism by the successors in title to the Oil Corporation.

In *The Freights of the Kate*, 1894, 63 Fed. 707, a steamship line obtained certain letters of credit from its bank, and as collateral security for the payment of the drafts drawn thereon, hypothecated to the bankers "all freights earned and to be earned". The freights referred to were the freights of all the several vessels of the line. The Court held that hypothecation of the freights created a general lien on the freights for all the voyages of all the boats and that such a maritime lien

was properly created by agreement. The Court further held that freights of vessels B, C and D might be hypothecated to obtain supplies for vessel A. At page 712 Judge Addison Brown said:

> "I see nothing invalid in such a general hypothecation. The parties, in effect, treated the vessels run by the company as constituting a line, and dealt with the line and all the vessels running in it, as with a single vessel. See *The Rosenthal*, 57 Fed. 254. This was the undoubted intention. In the negotiations, no particular steamers were named; the drafts were to disburse the company's steamers, *i. e.*, any or all of them, as might be needed. As between the parties there is surely nothing invalid in procuring necessary supplies for a line of vessels by an extended hypothecation of that kind. A master could not make such an extended hypothecation, because his authority extends only to his own vessel. But the owner is not thus limited. 'No one has ever questioned', says Butler, *J.*, in *The Mary Morgan*, 28 Fed. 199, 'that an express lien may exist whenever the owner chooses to create it. The freights belonged to the steamship company; and in thus hypothecating them, they exercised no more than an owner's ordinary right. The extended hypothecation was adapted to the modern modes of business, and was not violative of any rule of the maritime or municipal law."

At page 713, Judge Addison Brown said:

> "* * * maritime liens, resting wholly on express contract, have constantly been enforced. Such is the ordinary express contract of bottomry; the lien for supplies, under the English practice; the lien for charter hire upon the sub-

> freights of a chartered vessel in possession of the charterer; the lien for supplies by material men, or for advances by the ship's agent, on dealings with the owner alone. *The James Guy*, 1 Ben. 112, Fed. Cas. No. 7,195; *Id.*, 5 Blatchf. 496, Fed. Cas. No. 7,196; *id.*, 9 Wall. 758; *The Kalorama*, 10 Wall. 214; *The Patapsco*, 13 Wall., 329; *The Stroma*, 3 C. C. A. 530, 53 Fed. 281, 283; *The Erastina*, 50 Fed. 126. See also *The Volunteer*, 1 Sumn. 551, Fed. Cas. No. 16,991; *The Kimball*, 3 Wall. 37, 44."

The Freights of the Kate, supra, stands specifically for the proposition that an hypothecation of freights earned and to be earned was a maritime contract and that it created a general lien on all freights of the steamship company, including those of vessels subsequently chartered, and that such a lien can be enforced in admiralty against the freights of vessels arriving after the failure of the company and further that this general lien was subordinate to any specific lien on the same freights for advances actually applied to assist the current voyage. In this case, as in the case at bar, there was a mortgage, but the Court said at page 714:

> "The only other party in the case who might complain of the general hypothecation, is the mortgagee; and under both the maritime, and the municipal law, I think the mortgagee's rights are inferior to this express hypothecation."

Again, the Court said at page 715:

> "The mortgagee and receiver contend that any such general lien as above stated is inferior to their claims. The ordinary rule, however, is that a mortgage of vessels is inferior in rank to sub-

> sequent maritime or statutory liens for supplies; because the former is a nonmaritime security, while the latter are in aid of the necessities of commerce and navigation. *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498."

In *The Advance*, 1896, 72 Fed. 793, affirming 63 Fed. 726, the owners of vessels borrowed money in the home port to discharge liens on vessels at foreign ports and enable them to continue their voyages. The owners expressly hypothecated the freights to cover the drafts. The Court held that this express hypothecation created a general maritime lien on the freights alone and did not create a lien on the vessel itself. Circuit Judge Shipman, who delivered the opinion of the Court, said at page 798:

> "* * * At the threshold of the inquiry, three facts are manifest: Firstly, an absolute necessity, recognized by each, and consequent upon the known insolvency of the steamship company, of a maritime lien of some sort; secondly, that a maritime lien was given, which the district court has found to be, at least, upon the freights,—a conclusion which has now become *res adjudicata*, and in which our examination of the case leads to a full concurrence; thirdly, and one of great importance, that whatever security was given was expressly given. The contract between the parties was an express contract, entered into between the owner of the vessels and Mr. Huntington. The antecedent circumstances are valuable for the purpose of throwing light upon the probabilities of the contract, and in the ascertainment of what one party would have naturally proffered and the other party would naturally have insisted upon; but whereas, in many cases, courts, in consequence of the

silence of the parties when the advances were made, or their subsequent forgetfulness of what occurred, are compelled to look at the inferences to be drawn from their conduct and acts, in view of the known insolvency of the owner, little resort can be had in this case to that class of evidence. There is a class of cases, in regard to maritime liens for supplies furnished to a vessel in a foreign port at the request of the owners or of their agent (of which *The James Guy,* 1 Ben. 112, Fed. Cas. No. 7195, and 9 Wall. 758, and *The Patapsco,* 13 Wall. 329, are examples), in which there was not apparently an express contract between the owners and the material men for the credit of the vessel, but in which the lienors' knowledge of the insolvency of the owner was regarded as a very significant fact, from which the inference could naturally be drawn that credit must have been given in part to the vessel. In this case a court is able to ascertain what the owner offered, and what the lienors apparently accepted, as security, at the time when the contract was entered into. The terms of the express contract, when they can be accurately ascertained, must preclude the idea of a contract to be ascertained by inference for another and different security from the one contained in the express contract. It is true that Huntington's knowledge of the utter insolvency of the steamship company is important to show that he naturally would have wanted to get all the security which was available, but, if the evidence shows that he did content himself with the security of the freights, his lien must rest where he placed it."

Astor Trust Co. v. *White,* 4th Cir. C. C. A., 1917, 241 Fed. 57, is relied on by the respondent. The case seems

to recognize the correctness of Judge Brown's decision in the present case, in view of the proof that the coal was used by the steamers. It apparently arose out of another phase of the same receivership as was involved in this case.

Certain supplies were needed for a fleet of four fishing steamers. The charterers' credit was poor. The appellees agreed to furnish the supplies provided they were secured by a lien on the vessels. This was agreed to and notes aggregating $2,000 were given, which were endorsed with the names of all the vessels and the names of two men. It was agreed further that for additional supplies furnished the appellees should have a lien on all the vessels, separately and as a whole. The aggregate value of supplies furnished was about $2,200.

Other parties libelled the four steamers and the appellees filed two intervening libels, one against the Steamer *Lawrence* for half of its claim, and one against the Steamer *Portland* for the other half. All four of the vessels were sold under decree, but only the *Lawrence* brought enough to pay more than the admittedly prior claims of wages. The appellees filed an amended libel against the *Lawrence* for the half of their claim for which they previously had libelled the *Portland*. Appeal was taken from the decree which sustained the amended libels and directed payment of the supplier's claims out of the fund resulting from the sale of the *Lawrence*.

Judge Knapp, delivering the opinion of the Court, said at page 60 (Italics ours):

> "Nearly 100 years ago, Mr. Justice Johnson, speaking for the Supreme Court in *The St. Jago de Cuba,* 9 Wheat, 409, 416 (6 L. Ed. 122), said:

'The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to the forfeited hull to get back, for the benefit of all concerned; that is, to complete her voyage.'

"And this figure of speech expresses the central idea of a maritime lien, namely, the equitable right, springing from the necessities of commerce, to hold the vessel itself for something done or furnished *to it* which enables it to continue in service, and without which its earning power would be greatly reduced, if not destroyed. It is the needful and saving benefit to the *res* which gives the right to proceed *in rem*. On no other basis can that right be supported. And this conception of the essential nature of a maritime lien pervades the whole range of statute law and judicial utterance upon the subject. For example, in 26 Cyc. 787, the principle is summed up as follows:

'The basis of a lien for necessaries is a benefit rendered the vessel. Hence, in order for such a lien to arise, the necessaries must be either delivered on board the vessel or brought into immediate relations with her, as by being delivered on the wharf or into the custody of some one authorized to receive them.'

"And this is but a paraphase of the oft-quoted statement in *The Vigilancia* (D. C.), 58 Fed. 698:

'There can be no delivery to the ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship *in rem*, until the goods are either actually put on board the ship, or else are brought within the immediate presence or control of the officers of the ship.'

"But this principle, long accepted and familiar, seems clearly to refute the contention of appellees

that the owner of two or more vessels, used in a common service, may by verbal agreement subject them to a joint and several lien, 'singularly and as a whole', for supplies furnished indiscriminately to all of them, without attempting to segregate or identify the portion designed for any particular vessel, so that each of them will be bound for supplies furnished to the others, even if it receives none itself, and that such a lien will be good as against a prior mortgagee whose mortgage is duly recorded. We cannot assent to the proposition. It is plainly at variance, in our judgment, with the fundamental idea of a maritime lien; nor has it ever been recognized, so far as we are aware, in the general maritime law of the country, or in any legislative enactment."

* * * * * * *

"The appellees refer us to a number of cases, among them *The Kalorama*, 77 U. S. 204, 19 L. Ed. 941, and *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, which hold that the owner may by contract express or implied, create a maritime lien for necessary supplies furnished to his vessel, even in the home port. This is undoubtedly the established rule of law, but it seems clearly without application. None of these cases touches, much less decides, the question here presented, namely, whether the owner can, even by express agreement, give a joint and several lien upon two or more vessels which will hold either of them, *not for supplies furnished to it, or intended for its use,* but for supplies furnished to the others, and which lien will be good as against a prior mortgagee. For that contention we find no authority. Indeed, in all the cases cited, it

appears either that the supplies were in fact furnished to the particular vessel sought to be charged, or that the decision was put distinctly on the ground of estoppel, as in *The Worthington*, 133 Fed. 725, 66 C. C. A. 555, 70 L. R. A. 353, where the dispute was solely between owner and libelant, and no rights of third parties were involved. Even in *The Wyoming* (D. C.), 36 Fed. 494, the Court said:

> 'Furthermore, if money is advanced to aid in running two steamboats, no lien can be allowed against either *unless the proof shows how much was advanced on behalf of each, and for what purpose it was used*'.

"We therefore conclude that the appellees' claim in this case cannot be sustained, and are the more content to so decide because of our disposition to restrict rather than enlarge the scope of secret liens."

It will thus be seen that this case is directly in point and very favorable to the Petitioner's contention in the case at bar. The liens were rightly allowed by the District Court, for here

> "the proof shows how much was advanced on behalf of each, and for what purpose it was used."

SIXTH POINT.

AS BETWEEN THE OWNER OF A VESSEL WHO AGREES TO GIVE A MARITIME LIEN FOR MONEY OR SUPPLIES AND THE PERSON FURNISHING THE MONEY OR SUPPLIES ON THE CREDIT OF THE VESSEL, THE OWNER IS ESTOPPED TO DENY THAT THE MONEY OR SUPPLIES WERE ACTUALLY USED FOR THE VESSEL.

In *The Worthington*, 133 Fed. 725, a bank advanced the sum of $300 to the owner of a vessel upon the credit of the vessel in order to enable the owner to load his ship. On the trial it was sought to be shown that the money was not actually used to load the vessel or for any maritime purpose. The Court refused to receive such evidence, holding that the owner was estopped to deny that the money was used for the purpose represented and so defeat the lien.

In the case at bar, the Oil Corporation bought the coal for their fleet, and the necessity for the possession of that coal was pressing and vital. We submit that the Oil Corporation and, consequently, any one taking title through it, as did the respondent here, is estopped from denying that the coal was used for the fleet upon the credit of which the coal was furnished.

To the same effect as *The Worthington* (*supra*), are *The Schooner Mary Chilton*, 4 Fed. 817; *The Robert Dollar*, 115 Fed. 218.

In *United Hydraulic Cotton Press* v. *Alexander McNeil*, Fed. Cas. No. 14,404, 20 Int. Rev. Rec. 175, money was advanced to the master on the credit of the ship and spent recklessly by him. The mortgagee of the ship set this fact up to defeat the lien, but the Court held the lien was valid.

In the case of *The Mary*, 1824, 1 Paine, 671, the owner of a vessel gave a bill of sale in the nature of a mortgage but was suffered to remain in possession and act as absolute owner, and her register and other papers remained unaltered. Some eight months thereafter he gave a bottomry bond for money advanced to purchase cargo. Judge Adamson held that upon principle the claim of the lender was to be preferred to that of the mortgagee. This is a leading case and is cited frequently as an authority.

It is quite clear from the preceding authorities that, under the undisputed circumstances in this case, the libelant was entitled at least to the relief given by Judge Brown, namely, to the maritime liens against the several vessels and for the amount of coal actually used by each, irrespective of the fact that the coal passed through coaling stations of the owner before it was actually put on board the vessels.

The suggestion of the respondent in its brief opposing the writ of *certiorari* that the Act of June 23, 1910, might be amended by Congress to adjust it to the requirements of modern business conditions is without merit.

No amendment is necessary.

The Act as construed in the case of *The Yankee*, 233 Fed. 919, is a workable, efficient statute and the decision in *The Yankee* is based upon principles of maritime law dating back at least as far as the case of *The Kiersage*, 2 Curtis 421, decided by Justice Curtis in 1855.

The Petitioner maintains that the case of *The Yankee* was correctly decided and that the doctrine of the case should be sanctioned by this Court and applied to the case at bar.

SEVENTH POINT.

THE DECISION OF THE DISTRICT COURT BELOW IN REGARD TO THE APPLICATION OF THE SUM OF $2,000 TO THE SATISFACTION OF INDEBTEDNESSS NOT COVERED BY THE LIBEL HEREIN WAS CORRECT.

It appears from the testimony that the Oil Corporation was indebted to the Petitioner for a balance of several thousand dollars for coal furnished during the year 1913, for which it held a note. *Record*, p. 20. It was also indebted for coal furnished in the early part of 1914, for which it held notes, and it was indebted for the five cargoes of coal in question, for which the libelant had a maritime lien. The account is contained in the Libelant's Exhibits 4 and 5. *Record*, pp. 63-64.

Payment for this coal, for which the Petitioner had a lien, was due on or before the 15th day of each month, for coal shipped during the preceding month. Libelant's Exhibit 5; *Record*, p. 63.

Nothing was paid on account of these five cargoes of May 9, May 23, June 9, June 20 and July 3. Libelant's Exhibit 5; *Record*, p. 63, and the libelant claimed maritime liens for the entire amount. *Record*, pp. 16, 22, 20.

On the 24th day of August, the Oil Corporation gave the Petitioner a sight draft on Proctor and Gamble of Cincinnati for $2,000, which was subsequently paid. *Record*, p. 31.

The testimony in relation to this transaction is as follows. *Record*, pp. 29-30:

> "X-Q. 163. Now, did your company, about August 24, 1914, give to the Piedmont Company

a sight draft on Proctor & Gamble, Cincinnati, for $2,000 which was subsequently paid?

Ans. That is my understanding.

x-Q. 164. *And upon what account was that payment made?*

Ans. *We left that to them. I don't recall that it was specifically directed what account it should apply to. I don't really know what account they did apply it to.*

x-Q. 165. The only account that they had against you was the account for the coal which you furnished in 1914, and these notes?

Ans. Which were past due.

x-Q. 166. Which were all the——

Ans. Past due.

x-Q. 167. They had been renewed—were they not?

Ans. I don't know.

x-Q. 168. You would not testify that they held any influence if they were past due before that?

Ans. I don't know. I know the original maturity date, whether they accepted the renewals or not, I don't recall.

x-Q. 169. Did you, about August 24, 1914, pay them the sum of $2000?

Ans. We did.

x-Q. 170. Sent them a draft for $2000?

Ans. Yes.

x-Q. 171. Did you send that by letter?

Ans. I think we handed it to Mr. Bohannon.

x-Q. 172. I show you a letter addressed by Mr. Bohannon to your company, under date of August 24, 1914, and ask if that is a letter acknowledging the receipt of this draft?

Ans. Yes, that is it.

x-Q. 173. And that draft was paid?

Ans. That draft was paid."

Mr. John S. Brophy, president of the Petitioner Company, testified as follows, *Record*, p. 31:

> "Q. 4. (By Mr. Woolsey) Does this statement show the condition of the account between the Piedmont & Georges Creek Coal Company and the Atlantic Phosphate & Oil Corporation for the year 1913 as it existed in February, 1914, with the exception of the last entry?
>
> Ans. That is a statement of the account as it existed after Feb. 9, 1914."
>
> Cf. Libelant's Exhibit 4, *Record*, p. 63.

At page 34 of the Record the following colloquy took place between court and counsel for both parties:

> "By the Court: Is there any question of the application of the $2000?
>
> Mr. Woolsey: That is the only question, sir, and I think we might stipulate that the amounts claimed in the libels are the agreed and reasonable value of the coal furnished as stated in the libels, and that they have not been paid, with the exception of the disputed credit of $2000 on the Proctor & Gamble draft, and as to that, that is in dispute as to the application of that payment.
>
> Mr. Gardner: We are perfectly willing to stipulate, as I understand it, that the amount of coal contained in those five shipments for which a lien is sought was furnished, that the prices charged for it were fair and reasonable prices.
>
> Mr. Woolsey: And agreed to?
>
> Mr. Gardner: And agreed to, and that it has not been paid for except as the payment of this Proctor & Gamble draft would constitute a payment in part."

At page 39 of the Record, Mr. Brophy testified on cross-examination:

"x-Q. 74. Now, with reference to this $2000 draft of Proctor & Gamble, that was paid, was it?

Ans. Yes.

x-Q. 75. *You say you credited that on your oldest account?*

Ans. *That is the way it was credited.*

x-Q. 76. *What was that oldest account?*

Ans. That was a note for $3800.

x-Q. 77. That note, at the time the Proctor & Gamble draft came to you and at the time it was collected, was not due, was it?

Ans. No, sir.

x-Q. 78. And that note was subsequently renewed for the full amount?

Ans. Yes, sir.

x-Q. 79. And you had no other outstanding account against the Atlantic Phosphate & Oil Corporation except the account for these shipments for which you now seek a lien, no account other than notes?"

At pages 40-41 of the Record he testified:

x-Q. 94. *With reference to this $2000 draft—was that originally credited upon any special note?*

Ans. *No, sir; I think not.*

x-Q. 95. I show you a claim which you made as lienor, or a claim made by the Piedmont & Georges Creek Coal Company as lienor, and signed by yourself as president of that company—or, rather, I show you a paper purporting to be signed, and ask you if that is what it purports to be?

Ans. What is your question?

x-Q. 96. That is a statement of claim made by you in behalf of your company to the Atlantic Phosphate & Oil Corporation?

Ans. Yes.

Mr. Woolsey: It is not a lien claim.

Mr. Gardner: Oh, no; it is a statement of this company against the Atlantic Company.

Mr. Woolsey: In respect to certain collateral.

Mr. Gardner: In respect to what was filed with them as a claim.

Mr. Woolsey: A claim against certain collateral. It speaks for itself.

Mr. Gardner: Very well, I simply identify it.

x-Q. 97. Now, I ask you whether you did not, in this claim, include the three notes, being all that you had and aggregating, as you state in this claim, the sum of $8,853.32, and did not further state that of that amount the sum of $6,853.32 remains unpaid, and I ask you if the difference between the amount for which you claim and the amount which you state remains unpaid, is not represented by that Proctor & Gamble note?

Ans. *It was represented by that.*

x-Q. 98. And there was nothing upon your books which showed the appropriation of that sum, of the amount of that draft—any special note?

Ans. At that time?

x-Q. 99. At that time.

Ans. I don't know what the date of that is.

x-Q. 100. That is dated January 4, 1915.

Ans. At that date—at the date of that, why, it was then charged in this.

x-Q. 101. Against the three notes?

Ans. Against one note.

x-Q. 102. On what note was it charged against them?

Ans. Against the $3800, first note.

x-Q. 103. When was it first charged against the $3800 note?

Ans. When we were advised that we could apply—when it was within our discretion to apply it against the oldest account.

x-Q. 104. When was that, about the time you made out this statement?

Ans. No. It was before that, if that is dated January.

x-Q. 105. *And then for the first time you made application against that note?*

Ans. *Yes.*

x-Q. 106. You didn't hold that a special note at the time that application was made, did you; you held another note of which that was a renewal?

Ans. Yes.

* * * * *

x-Q. 107. Now, Mr. Brophy, this paper which Mr. Gardner has just been showing to you that was merely a notice, was it not, with regard to foreclosure of certain collateral which you held?

Ans. Yes.

x-Q. 108. Now do you remember when it was that you charged this $2000 received from the Proctor & Gamble note against the balance due from the season of 1913 as shown by Plaintiff's Exhibit 4?

Ans. The exact date it was charged, do you mean against that?

x-Q. 109. Yes; when it was charged against that.

Ans. Well, we received the draft for $2000 in

August—the 25th—apparently, I think the note was renewed in September, and it was not until it passed into the hands of the receivers that we were instructed that we could apply——

Mr. Gardner: Instructed by your counsel?

The Witness: Yes, sir—that we could apply that to the oldest account. We applied it generally on the books; when we first received it it would be cash to the *whole account.*

x-Q. 110. (By Mr. Woolsey): To the *whole account?*

Ans. To the whole account."

When the cash was received on this draft, the *whole account* consisted of

(1) the balance due from 1913, for which there was a note for $3,800 outstanding;

(2) the amount due for the coal that was furnished in February and March, 1914, for which there were notes outstanding; and

(3) the amounts due for the five cargoes of coal here in question, for which the libelant had a maritime lien.

The total amount of the account, without interest, was $26,704. *Record,* pp. 108, 109.

When the draft was received, it was received without any direction whatever from the Oil Corporation as to how the Petitioner should apply it, and when it was cashed, the Petitioner received it as cash on account of the whole indebtedness.

The Oil Corporation did not know, and undoubtedly did not care where this small sum of $2,000 was applied, as it was hopelessly indebted to the Petitioner on notes, and also for these five cargoes of coal, for which the

Petitioner had always claimed a maritime lien against all the vessels. This maritime lien was admitted by the Oil Corporation.

Subsequently, on December 14th, the Petitioner filed five libels for the entire amount of the five cargoes for which they claimed maritime liens.

When the Petitioner demanded payment of the balance that was due it on notes of the Oil Corporation, it then for the first time actually appeared that it had appropriated this $2,000 in reduction of its oldest account.

Until this case was heard no claim whatever was made by the Oil Corporation, or by anybody representing it, that this payment of $2,000 had been improperly applied. At the trial it was urged by respondent that the $2,000 should have been applied in payment on the five cargoes of coal for which the Petitioner claimed maritime liens.

The Court, having partially considered the matter of determining the amount that was due to the respective vessels, but undoubtedly, not having clearly in mind just how or when this coal was actually distributed and the exact state of account between the parties, when the $2,000 was paid, said, in its first opinion, *Record,* pp. 79-80 [Italics ours]:

> "There remains a question as to the application of payment to the Coal Company of the sum of $2,000, made on or about August 24, 1914.
>
> "At this time the Coal Company held notes of the Oil Corporation that were not yet due. The book account for the five shipments of coal for which a lien is now claimed was then due. After the receivership of October 19, 1914, this payment

was credited upon one of the notes, which had been renewed after the receipt of the check for $2,000.

"To so credit the amount after the receivership would result in prejudice to the mortgagee by subjecting the property to a maritime lien to the amount of about $2,000.

"I am of the opinion that this payment should be applied to the open account rather than to the notes not due at the time of payment, and that the claim for maritime liens must be reduced by the amount of the payment of August 24, 1914; either by a *pro rata* reduction or by the extinguishment of the claims upon certain vessels, *as shall hereafter be determined.*"

When, however, the draft decree was prepared, it was pointed out to the Court that at the time that this draft was received, to say nothing of the time when it was applied in reduction of the oldest account, the Oil Corporation itself had actually used out of these five cargoes of coal in its *factory* at Promised Land, approximately 891 tons, amounting in value to $2,337.97, and at its *factory* at Tiverton, approximately 71 tons of the value of $266.25, and also at Promised Land, there was unaccounted for, 891 tons of coal valued at $2,925, or a total of $5,529.32, *Record,* p. 82, for which the Coal Company had no security whatever. In addition it was called to the court's attention that a number of vessels *not before the Court,* but belonging to the Oil Corporation, had also used a portion of this coal, amounting in value, in accordance with the Court's opinion first filed, to the further sum of $2,686.08. *Record,* p. 81.

Thereupon the Court, in view of the facts before it, on the 10th day of July, 1917, found, *Record*, pp. 80, 81:

> "Upon hearing for the settlement of a decree the question arises whether the sum of $2 000 should be applied in reduction of the maritime liens.
>
> In the opinion filed January 29, 1917, it was said that
>
> > 'This payment should be applied to the open account rather than to the notes not due at the time of payment.'
>
> The Libelant now shows that the open account on August 24, 1914, the date of payment of the sum of $2,000, exceeded the maritime liens on the vessels now libelled, and possible liens on other vessels not libelled,* by the amount of $5,529.32. This was unsecured and was due, whereas the notes referred to in the opinion were for coal previously furnished, and were not due. Under these circumstances I am of the opinion that the libelant, under the ordinary rule, had the right to apply the payment to the unsecured open account; and as after this application there still remains a balance of $3,529.32 on open account not secured by maritime liens or otherwise, this application does not have the effect of reducing the amount of the maritime liens for coal furnished to these vessels."

After the entry of the decrees on this opinion, the Petitioner discovered that there had been an error made in the distribution of the coal which would account for certain coal which the Petitioner had been unable to trace.

*These vessels were the *Easthampton*, the *Portland*, the *Strong*, the *Sanford*, and the *Adroit*.

The case was reopened. The amended decree in accordance with the true facts was filed, which shows that in respect of the coal used at the factory at Tiverton and at Promised Land, there was due and unpaid to the libelant, for coal from these five cargoes, the sum of $3,188.73. *Record,* p. 107.

This amount was due at the time the proceeds of the draft were received, and, of course, it was long overdue at the time the proceeds of the draft were actually credited on the oldest account. This did not take into account the amount that was also due for coal which was used by other vessels of the fleet, not before the Court, and against which the Petitioner would have been entitled to a lien if they could have been reached by process.

It is respectfully submitted, therefore, that the finding of the District Court that the $2,000 should be applied to the unsecured open account was sound and in accordance with the well settled rule, even assuming that the Petitioner made a mistake in supposing it could apply the payment in reduction of its note account.

This case clearly falls within that class of cases where the debtor, having requested no application of the $2,000, the creditor was at liberty to apply it within a reasonable time where he saw fit, and where his security would be best preserved.

The law in relation to the application of payments is well settled in this country.

Where there are different claims, and payments are made without direction by the debtor how the payment shall be applied, the creditor may apply such payment

to whichever of them he chooses, and at any time before the account is settled or suit brought.

If he does not exercise his right, then the Court will apply it as the law requires. *McCartney* v. *Buck*, 12 At. Rep. 720.

This is the law as laid down in *Peters* v. *Anderson*, 5 Taunt. 596, where the Court held that a person who is indebted to another on two several accounts may on paying him money, ascribe it to which account he pleases, and his election may either be expressed or may be inferred from the circumstances of the transaction. But if the debtor does not pay specifically on one account, the creditor may afterwards appropriate the payment to the discharge of either of the accounts that he pleases.

To the same effect are *Upham* v. *La Favour*, 11 Metcalf at p. 185; *Pennsylvania Company, Appellant*, 7 At. Rep. p. 72; *Leeds* v. *Gifford, N. J. Chan.*, 5 At. Rep. p. 798; *Greenleaf on Evidence*, 15 Ed. Sec. 530-533; *Parker* v. *Green*, 8 Metc. (Mass.) p. 144.

It also appears equally well settled in the United States that the creditor may exercise his right of appropriation *at any time he pleases*, and this unlimited right has been recognized in the United States, subject only to this restriction, that he cannot appropriate a general payment to a debt created *after* the payment was made. *Greenleaf on Evidence*, 15 Ed., Vol. 2, Sec. 532.

This is the law as laid down by the Supreme Court of the United States in *Mayor, etc.*, v. *Patton*, 4 Cranch, p. 317 (Italics ours):

> "It is a clear principle of law that a person owing money on two several accounts as upon a

> bond and simple contract, may elect to apply his payments to which account he pleases, but if he fails to make the application, the election passes from him to the creditor. *No principle is recollected which obliges the creditor to make this election immediately.*"

In *Pearse* v. *Walker*, 103 Ala., at p. 253, it was said (Italics ours):

> "Some stress seems to be laid by the Chancellor on the fact that the payment was not entered on account of the mortgage with the partnership until more *than twelve months after it was made*. If this case were to be determined wholly on the right of the creditors to apply the payment, this fact would be of little if any significance. *The general principle is that a creditor's right of application is not limited in point of time. He may make it at any time he elects*, but having once made it, he cannot change it without the consent of the debtor."

Whether or not the application made by the creditor of this payment of $2,000 in reduction of its note account was correct, there can be no dispute under the law that when the Court came to make the application it was properly made.

The law in relation to this point is almost elementary that where neither party has made a proper application, the Court will make the application and it will in every case, when called upon to make the appropriation of the payment, apply it to the debt which is least secured. In addition to the cases above cited this is held in *Terhune* v. *Cotton*, 12 N. J. Eq. Rep. at p. 238, and *Small* v. *Olden* (Iowa), 10 N. W. Rep. at p. 737.

In the last named case the Court said:

> "The law secures to the plaintiff the benefit of all the securities he held, and will so appropriate the sums realized as to secure the payment of both debts. * * * Now, as against the debtor, he is entitled to payment in full of his claims upon them. His securities will be so enforced that this right will be preserved. If the proceeds of the sale in this case are applied *pro rata*, this right will be defeated. If it be applied on the note signed by Jameson alone, it will be defeated. There is no ground which would require proceedings resulting in the defeat of the creditor as to any part of his claim."

This is the law as laid down in *Greenleaf on Evidence*, 15 Ed., Vol. 2, Sec. 533:

> "Therefore, where a general payment is made without application by either party and there are divers claims, some of which are but imperfectly and partially secured, the Court will apply it to those debts for which the security is most precarious."

This is also the decision of the United States Circuit Court in *Coons* v. *Tome*, 9 Fed., 532, where the Court said (p. 536):

> "The corporation it is to be observed did not undertake to direct the application, and is not objecting to the appropriation made by Tome. His appropriation is the very one the law itself would have made, in the absence of any by Tome or the corporation; for it is well settled that the law will apply the payment in a way most beneficial to the creditor, and therefore to the debt least secured."

In *Schuelenburg* v. *Martin*, 2 Fed. 747, the United States Circuit Court says (p. 749):

> "In *Field et al.* v. *Holland et al.*, 6 Cranch, 8, Chief Justice Marshall, in delivering the opinion of the Court, said:
>
> 'It is contended by the plaintiffs that if the payments have been applied by neither the creditor nor the debtor they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention. The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves upon the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves upon the Court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious. And see *Mayor, etc.*, v. *Patton*, 4 Cranch, 317; *The U. S.* v. *January et al.*, 7 Cranch, 572."

It is also well settled in the United States that the application of the payment will be made, which is most beneficial to the creditor.

This was decided in *Nichols, Shepherd & Co.* v. *Knowles*, 17 Fed. 494, where the Court said (p. 495):

> "This view is much strengthened by the fact that some of the notes were secured by the indorsement of a third party as well as by the chattel mortgage, from which it may be inferred that the

> parties intended to apply the proceeds of the sale of mortgaged property first to the notes not otherwise secured, so as to give the creditor the full benefit of all his security."

No controversy arose here in relation to the application of the payment of the $2,000 until the time of trial. It was then too late for the debtor or anyone claiming under the debtor to raise a question as to such application.

In *National Bank* v. *Mechanics Bank*, 94 U. S. 437, the Supreme Court said (p. 439) [Italics ours]:

> "The rule settled by this Court as to the application of payment is that the debtor or party paying the money may, if he chooses to do so, direct its appropriation. If he fail, the right devolves upon the creditor. If he fail, the law will make the application according to its own notions of justice. *Neither of the parties can make it after a controversy on the subject has arisen between them, and, a fortiori, not at the trial.*"

In the present case the District Court has made the application in a just way, in accordance with settled principles.

The statement of facts in relation to this transaction as set forth in the brief filed by the claimant in the Circuit Court of Appeals, states:

> "Another issue involved in the case relates to the application of a payment by a sight draft for $2000 sent by the Oil Corporation to the Coal Company on August 24, 1914. At that time the Coal Company held notes of the Oil Corporation which were not due, and they also had a book account against the Oil Corporation for the five shipments of coal now in question. No special ap-

plication of this payment was made at the time, but long after the receivership, the Coal Company credited it on a $3800 note which in September, several weeks after receipt of the check, had been renewed for its full amount. We claimed at the trial that this payment should have been credited on the open account and that therefore the sum of $2000 should be deducted from the sum for which the Coal Company sought to establish maritime liens."

It is respectfully submitted, as hereinbefore shown, that this is not a correct statement of the facts.

What is therein called the "book account" was better secured with paramount liens behind it than the notes were, but it is true that no special application of the appropriation of this payment was made to any account until after the receivers were appointed, when it was sought to be applied on the oldest account.

Further, what was contended by the respondent at the trial and at the time that the terms of the draft decree were fixed, was that the payment of $2000 should be applied *"pro rata in extinguishment of maritime liens on several vessels libeled in this cause"*. *Record*, p. 80.

The decisions in the various cases cited in the respondent's brief below on the question of application of payments are not pertinent to the case at bar because the facts underlying them are not similar to the facts here. The universal principle is that the language used in opinions must be applied to the facts in the case in which the expressions are used. *Cohens* v. *Virginia*, 6 Wheat, p. 264.

If this Court should determine that an improper ap-

plication of this payment was made by the Petitioner, then this case falls within that class of cases, where the District Court had a right to make the application, which in equity and justice should be made.

As it clearly appears that at the time the draft for $2000 was received and applied, the Oil Corporation was indebted to the Petitioner for coal furnished, which had been used in its factory, for which the Petitioner had no security, to the amount of approximately $3188.73, the District Court properly held that this $2000 should be applied in reduction of that amount, rather than to reduce or destroy the maritime lien which the District Court determined that the Petitioner had for coal used on the vessels.

If it be urged here that this to some extent reduced the security of the mortgagee, it can be urged with equal force that the mortgagee took his property with full knowledge that all maritime liens were paramount to the lien of the mortgagee, who practically stands in the shoes of the owner.

It can also be urged that in equity no part of this $2000 should be applied to reduce the maritime liens against these vessels, since there are still outstanding, unsatisfied, not before the Court, maritime liens against other vessels, viz., the steamers *East Hampton*, *Portland*, *Strong*, *Sanford* and *Adroit* for use of the coal here in question, to a far greater amount than $2000, of all of which the mortgagee has had the benefit and advantage.

It is respectfully submitted that the decision of the District Court, with the full record before it as to just

how the account stood at the time this draft was received, is sound and should be sustained.

If, however, this Court should hold that the $2000 should be applied in a different manner than it was applied by the District Court, then, it is respectfully submitted, that it should be applied in extinguishment of the maritime liens against the vessels that are not in custody.

LAST POINT.

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED AND THE DECISION OF THE DISTRICT COURT SUSTAINING THE LIBELANT'S LIENS SHOULD BE REINSTATED WITH A PROVISION FOR RECOVERY BY THE PETITIONER OF INTEREST FROM THE DATE OF THE DECREE IN THE DISTRICT COURT AND WITH COSTS OF ALL PROCEEDINGS IN ALL COURTS TO THE LIBELANT.

Respectfully submitted,

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Coal Company.

January, 1920.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. [redacted]58

PIEDMONT & GEORGE'S CREEK COAL COMPANY,
Petitioner,

vs.

SEABOARD FISHERIES COMPANY,
Claimant, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF AND ARGUMENT ON BEHALF OF SEABOARD FISHERIES COMPANY, CLAIMANT-RESPONDENT.

ROYALL VICTOR,
Of Counsel.

The Court Press, Inc., Law Printers, 76½ Pine Street. Phone: John 5233

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Supreme Court of the United States

OCTOBER TERM, 1919—No. 211.

PIEDMONT & GEORGE'S CREEK COAL COMPANY, *Petitioner,* —against— SEABOARD FISHERIES COMPANY, *Claimant, etc.*	Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF AND ARGUMENT ON BEHALF OF SEABOARD FISHERIES COMPANY, CLAIMANT-RESPONDENT.

Statement.

Though there is little dispute about the facts, we submit the following statement as the basis for the points to be made in this brief. We disagree with some of libelant's conclusions and desire to clarify certain aspects of the case not fully covered by its brief.

1. *The five shipments of coal for which a maritime lien is claimed and the use to which the coal was put.*

The five shipments are shown in libelant's Exhibit 5 (Record, p. 64). They are the shipments of

May 19	911 Tons
" 23	922 "
June 9	1,187 "
" 20	861 "
July 3	1,439 "
	5,320 Tons

The shipment of June 20 went to Tiverton, the rest to Promised Land. The coal, therefore, was delivered as follows:

To Promised Land	4,459 Tons
To Tiverton	861 "
	5,320 Tons

The way in which the coal was used was as follows (see Amended Final Decree in Case No. 1359; Record, pp. 106-107):

	Promised Land Coal-Tons	Tiverton Coal-Tons	Total
By libelled vessels	2,778	626.5	3404.5*
By vessels not libelled	790	163.5	953.5
By factories on shore	891	71	962
Total	4,459	861	5320

It thus appears that between one-fifth and one-sixth of the five shipments was used by the factories on shore.

2. *The amounts used by the vessels coaling at Promised Land are merely estimates. There is no telling how much of the coal for which liens are claimed was actually used by the different vessels.*

This is due to the fact that the four shipments of coal to Promised Land were mingled in the bins there with 1,068 tons of coal previously delivered and paid for (Record, p. 107). This mingling of coal for which liens are asserted, with coal for which no liens are asserted, is undisputed. Therefore, as to the shipments to Promised

*The number of tons (3509.5) shown in the tabulation on p. 28 of petitioner's brief is incorrect. There is an error in the footing, which should be 3,409.5 instead of 3509.5; and the amount used by the *Herbert M. Edwards* should be 424 tons instead of 429. (See Rec., p. 137.)

Land, there was no possible way of proving (and there was no attempt to prove) just how much of the lien coal was used on the steamers that coaled there. It *may* be that most or all of the original 1,068 tons went into the steamers, which would by so much have reduced the amount of lien coal used by them, and by so much increased the amount of lien coal used in the factories. Or vice versa. There is no telling. Also there is no telling which vessels used more than their proportion of lien coal and which less. The books of the Company merely showed the total amount of coal that each steamer used. The bookkeeper made an estimated reduction from these amounts, based on the proportionate amounts of lien and non-lien coal, to arrive at the amount charged as a lien against each vessel. In other words, as to the vessels coaling at Promised Land, both the items and the total shown on page 28 of libelant's brief are merely estimates. The bookkeeper's method of calculation is shown by his evidence on the motion to reopen the cases (Record, pp. 89-104). It is also undisputed that the commingling of the coal was perfectly lawful and within the contemplation of the parties.

3. *The contract for the coal was a contract contemplating both a maritime and a non-maritime use of the coal by the purchaser, and the seller perfectly understood that the coal was to be used by the purchaser's factories on shore as well as by the purchaser's vessels.*

We do not understand that libelant disputes this. As Judge Dodge has said:

> "There can be no doubt that according to the understanding between the parties some at least of the coal to be furnished would be needed in the factories, and the oil corporation was left, so far as any understanding with the libellant was concerned, to use the coal either in the factories or

on the vessels of its fleet as it might subsequently desire."

The oil company's vessels caught fish and its factories made them into oil. Its vessels loaded at its factories. The coal company was supplying its coal requirements for the season of 1914 (see Meadows, Record, p. 16, Q. 16; p. 21, QQ. 67-70; p. 28, QQ. 152-156). When the parties came to reduce their agreement to writing (Claimant's Exs. 8 and 9, letters of May 28, 1914, Record, pp. 68-69), the agreement was spoken of as an agreement "for the furnishing of your coal requirements at Promised Land and Tiverton for the current season," and as an agreement "relative to our requirements of coal at Promised Land and Tiverton for the coming season." Similarly in the earlier contract of February 13th, covering the first of the nine deliveries (Claimant's Ex. 1, Record, p. 67), the cargo was spoken of as "being an advance of material necessary in the operation of the plant and steamers. * * *" As shown above, between one-fifth and one-sixth of the coal comprising the last five shipments (the shipments in question) was used in the factories. The contract for the coal, therefore, was not a maritime contract. (The authorities are cited in the brief.) The statement on page 11 of Petitioner's brief, to the effect that the distribution of the coal "among the vessels" was left "to the agency of the oil corporation itself," is therefore, if not misleading, certainly incomplete; for not only was the distribution of the coal among the vessels left to the oil company but also its distribution between the vessels on the one hand and the factories on the other. The further statement on the same page of the brief that, as to the coal used in the factories, the petitioner "either lost or failed to perfect its maritime lien" is singular, inasmuch as petitioner cannot possibly claim that it had any right whatever under the contract to direct how the

coal should be used—wheher for the factories or for the vessels.

Indeed, it may be doubted whether the oil company would have been guilty of any violation of its contract obligation if it had resold all the coal thus delivered t. it, using none of it, either for its factories or for its plant. But, however that may be, there can be no possible dispute that the oil company had the undoubted right, at the very least, to appropriate (as it did appropriate) for its factories whatever coal these might require, be the amount large or small, out of any shipment ordered.

4. *Title to the coal in question passed to the oil company, and delivery to it was made, on its being loaded into the barges by which it was conveyed to Promised Land and Tiverton.*

This is clearly shown by the exhibits. The letter of May 28, 1914, from Mr. Bohannon of the coal company to Mr. Meadows of the oil company (Record, p. 68), which "confirms" their oral contract of "a few days ago" seems to have reference to an oral agreement made between Bohannon and Meadows at or prior to the first of the five shipments in question, the shipment of May 19th (Record, p. 64); for the so-called "order" for this shipment (Record, p. 59) is dated May 29th, the day after the letter of May 28th. This letter gives the price of the coal as "$3.10 gross ton, New York loading piers." The "order" of May 29th shows the price as "$3.30 gross ton delivered c. i. f. Promised Land." Mr. Meadows testified that two of the five shipments in question were delivered on barges belonging to the oil company and the others on barges belonging to the coal company (Record, p. 28, QQ. 147, 151). The two shipments in oil company barges are evidently the seventh and ninth of the nine shipments shown on Record, p. 64, and the price for these

shipments was the contract price specified in the letter of May 28th, namely $3.10, and the deliveries were f. o. b. St. George, and Port Reading respectively. (See also the corresponding orders: Order of June 8, Record, p. 59, and Order of July 2d, Record, p. 60.) In short, the contract was in effect f. o. b. the coalcompany's loading piers, except that when the coal was shipped in the coal company's barges, instead of in those of the oil company, the price of carriage and insurance was added and the orders were on a c. i. f. basis (See orders of May 13, May 29 and June 17, Record, pp. 58-60). Title, therefore, to the coal clearly passed to the purchaser at the loading points and not at the place of ultimate delivery. This is in accord with Judge Dodge's opinion, which states:

> "The above facts regarding said shipments from the libelant's piers, not referred to in the opinion below, but appearing from the invoices and bills of lading relating to the shipments, indicate that delivery of all the coal so shipped to the oil corporation took place at the libelant's loading piers."

(The invoices and the bills of lading are not printed in the Record. See Stipulation, Record, p. 71.)

We do not understand that Judge Dodge's view as above expressed is disputed by the petitioner.

5. *The contract for the coal.*

That there was a contract between the parties and that it was a contract for the oil company's season's needs of coal, both ashore and afloat, cannot be doubted. Judge Dodge in his opinion says that the contract

> "was never completely embodied in any written document."

While this may be true, the general terms of the prior oral agreement are at least clearly evidenced by the two letters mentioned above under date of May 28, 1914 (Claimant's Exs. 8 and 9, Record, p. 68-69). The letter from the coal company to the oil company begins:

> "This is to confirm agreement for the furnishing of your coal requirements at Promised Land and Tiverton for the current season, coal to be invoiced as follows":

Amounts and prices are then stated, and the letter concludes with the following sentence:

> "This is not a formal contract, but is as per the writer's understanding with you a few days ago."

The oil company's reply of the same date states that the prices mentioned "are in accordance with our understanding of the agreement and are satisfactory," and concludes with the following statement:

> "If at any time you wish a more formal contract than this letter we shall of course be glad to supply it."

6. *The alteration of the invoices.*

Petitioner's statement of facts does not perhaps make it quite clear that all the shipments of coal were originally invoiced to the oil company and charged to the oil company on the coal company's books, and not billed and charged on the books of the coal company to the vessels of the oil company's fleet. The fact, however, is not disputed (See Meadows, Record, p. 25, Q. 129, and pp. 26-28). In September, 1914, after all the coal had been delivered and when the coal company was threatening libels against all of the oil company's vessels, the coal company was induced to libel only the five best boats. In furtherance of this plan the head-

"Q. 30. Now, Mr. Meadows, it was the understanding between you and the Piedmont and George's Creek Coal Company that all the coal furnished under those orders should constitute a maritime lien against the vessels. A. That was our agreement" (Record, p. 17).

A. "There was letters exchanged in which we specifically recognize our obligation and our agreement with these gentlemen that prior liens did exist" (Record, p. 19).

"Q. 48. Well, had there been any record made on your books as to the boats to be chargeable for these liens, the boats against which the liens were to be impressed? A. There had been no singling out of vessels, nothing except the entire fleet had been referred to prior to his visit" (Record, p. 19).

"Q. 56. By whom was this change in the invoice made? A. It was made by us.

"Q. 57. Made by you? A. Yes."

"Q. 58. And was the making of that in pursuance of the prior agreement with regard to the maritime lien. A. Pursuant to that, and picking out five vessels instead of the lien continuing against the whole set of 19" (Record, p. 20).

"A. * * * A proposition was made which, as I have testified, Mr. Brophy would not accept, and then in March, I think, the arrangements were finally consummated" (Record, p. 21).

"C. Q. 97. But that no specific vessels were picked out. A. It was agreed specifically they should have a lien on the vessels that would operate consuming coal.

C. Q. 98. On all the vessels? A. That was an agreement made at the time the coal was arranged for" (Record, p. 23).

"C. Q. 109. And up to that time your agreement with the Piedmont Company had been that they should have a lien upon your vessels generally? A. Upon all the vessels.

C. Q. 110. Up to that time no special vessels had been mentioned? A. Yes; each had been mentioned.

C. Q. 111. Each of the 19? A. Each of the 17.

C. Q. 112. But none had been picked out to be made the subject matter of the lien? A. Yes; they had all been picked out. The only difference as we say absolutely, the only difference that resulted from Mr. Brophy's conference was that we induced him to bring his action against five boats instead of against the 17" (Record, p. 24).

"Q. 177. (By Mr. Woolsey) What was the total amount of coal which you arranged to secure from the Piedmont Company? A. It is contained in one letter there—the May 28th, I believe—where it was finally confirmed, something over 10,000 tons.

Q. 178. And for that you were to give maritime liens on your entire fleet? A. Yes" (Record, p. 31).

Clearly none of the above statements adds anything to Meadows' report first quoted above of his conversation with Bohannon.

Mr. Brophy, the president of the coal company, knew nothing about the matter except what Bohannon had reported to him and what he had instructed Bohannon. He was allowed to state that his instructions to Bohannon were as follows:

"I agreed to extend them credit provided their account was absolutely secured by maritime liens" (Record, p. 39).

On cross-examination he was asked, "All you know about this matter at all, whether any agreement was made, is from statements which were made to you by Mr. Bohannon?" He answered, "That is correct" (Record, p. 39).

Now, Mr. Meadows was perfectly right in his statement that the law would permit the coal company to "hold and maintain a maritime lien on the steamers,"

and that the coal company "had a perfect right to use the credit of the steamers in the acquisition of coal."

All that the coal company had to do in order to acquire its lien was to deliver the coal to the vessels in the manner required by the statute—and, as we shall show, the coal company could easily have done this with very little trouble or expense to itself. And this the oil company expressed its willingness to have done. We submit that it is only in this sense that the evidence shows any "express contract" for a maritime lien. If the evidence shows anything more, what it shows is that the parties misunderstood the law and conceived that the statute gave a supply man a maritime lien for supplies ultimately delivered upon and used by vessels under a contract of sale like the one in question, without requiring the supply man to make the statutory delivery to the vessels.

We do not believe, and we shall try to show, that even if the parties had expressly and formally contracted for a lien on such of the coal as the oil company might eventually choose to appropriate to its vessels under a contract like the one in question, a maritime lien could be so obtained. In this statement, however, we desire merely to give our reasons for urging that the evidence is clearly insufficient to show that any such express contract was made.

9. *Short summary of the facts upon which the petitioner claims a statutory maritime lien.*

We have a contract for a season's supply of coal. It is perfectly understood and agreed that some of the coal is to be used by the buyer to coal its fleet and some for shore purposes, according to the buyer's needs during the season. The contract is silent as to whether orders under it for shipments shall specify a maritime or non-

maritime use of the whole or any part of any particular shipment, and the orders under it make no such specifications, being merely for the buyer's general requirements. These orders are filled by delivery to the buyer at the seller's wharves. At the buyer's wharves the coal is unloaded, not into or alongside the vessels but into the owner's bins, in which it will await the buyer's subsequent apropriation of it to its factories or to its steamers. The seller has no power to direct the proportions in which this appropriation shall be made. It is known moreover to the seller that these bins may contain (and one of them does contain) other coal with which it will be perfectly permissible for the buyer to mix the contract coal, and with which the buyer in fact does mix it.

In addition to this we have the evidence above set forth relative to the alleged contract for a maritime lien.

POINT I.

APART FROM THE EVIDENCE CONCERNING THE ALLEGED AGREEMENT TO GIVE CREDIT TO THE VESSELS, THERE WAS CLEARLY NO FURNISHING TO THE VESSELS WITHIN THE MEANING OF THE ACT OF JUNE 23, 1910.

We think that the petitioner's contentions can best be analyzed by first considering the facts apart from the evidence relating to the alleged contract for a maritime lien. The initial question, therefore, is whether the facts as stated above, and without reference to this evidence, show a "furnishing" of supplies "to" the vessels within the meaning of Section 1 of the Act of June 23rd, 1910 (36 Stat. 604). The coal unquestionably was delivered on the order of the owner. Was it "furnished to" the vessels?

There is no doubt that the expression "furnishing to a vessel" as used in the maritime law, and when used with reference to the furnishing of supplies, indicates something more than a sale or delivery to an owner *for* the vessel. The phrase imports a personification of the vessel, and the notion therefore is of a direct dealing with the vessel. The phrase sometimes includes the notion of dealing with the vessel in a strictly contractual sense; that is to say, it sometimes includes the notion of a giving of credit to the vessel. But in its more ordinary sense, it is used in a non-contractual way as importing the active agency of the seller in effecting the delivery of the goods directly to the vessel. That this is the way in which the phrase is used in the Act of 1910 will be shown under Point II. Just as the furnisher of supplies in "giving credit to the vessel" is conceived as contracting with the vessel itself, so the "furnishing to" the vessel required by the maritime law—where the phrase is used as signifying the act of delivery to,—means that the seller must do something that can properly be regarded as a bringing of the goods by himself to the vessel. In other words, the test of a maritime delivery to the vessel is not that the goods are ultimately destined for the vessel. The goods must be appropriated to the vessel by the seller and not by the owner.

The broader use of the expression "furnishing to a vessel," to indicate a credit given the vessel, and its more special use to indicate a delivery to the vessel are, though related, entirely distinct. Not only, as will appear, does the Act of 1910 make this clear, but the cases decided before the Act also show that a maritime lien is not obtained unless there is both a credit to and a delivery to the vessel. The fact that the supplies have been delivered "to" the vessel in the maritime law sense may frequently (where the question is material) afford evidence that credit was given to the vessel and not to the owner. But the

converse is obviously not the case. To whom credit is extended is a question of contract—of intention—and evidence of intention may be found in the acts of the parties. What, however, determines whether supplies have been delivered "to" a vessel is the *acts* of the seller with reference to the supplies, not his understanding or agreement as to his security.

Prior to the statute a credit to the vessel was presumed without more only in a rather narrow range of cases—generally speaking, only where the supplies were delivered to the vessel in a foreign port on the order of the master. In other cases, a credit to the vessel had to be specifically proved or implied from the particular circumstances. The cases were in considerable confusion, and the plain object of the statute was to dispense with the necessity of proof of an express or implied agreement to give credit to the vessel in all cases where the supplies had been delivered to the vessel on the order of the persons named in the Act.

No case, either before or under the Act, has been cited in which it has been held or even intimated that evidence of an agreement or intention to give credit to the vessel could dispense with the maritime-law requisite of a furnishing to the vessel, in the sense of a delivery to the vessel. The cases of express contracts of maritime hypothecation will be discussed under Point III.

What then constituted, as regards supplies, a "furnishing to" a vessel in the sense of a delivery to the vessel?

The most frequently cited case is *The Vigilancia,* 58 Fed. Rep., 698. In that case the vessels lay in their home port, New York. A maritime lien was claimed for oleomargarine supplied to them. It was illegal to sell oleomargarine in New York. The goods were therefore ordered by telephone from the libelant in New Jersey. The libelant

delivered them to truckmen in Jersey City, who took them to the vessels in New York and there delivered them on board. The libelant's contention was that the sale, therefore, was complete in New Jersey. Conceding this to be true, the Court held that for the very reason that the sale was completed in New Jersey, there could be no maritime lien. The Court said (p. 700):

> "If, on the other hand, the libelants' evidence be deemed sufficient to prove that the title to the property passed in Jersey City to the steamship company, and that the delivery to the truckman there was, in law, a delivery to that company; still, that would not amount to a delivery, or to a furnishing of supplies, to the ship in Jersey City; but only to a common-law delivery to the company, sufficient to bind the company in personam; which is a very different thing from a delivery to the ship, or binding the ship *in rem*. The ship was not in Jersey City; but within a different jurisdiction, a mile or two away.
>
> "There can be no delivery to the ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship *in rem*, until the goods are either actually put on board the ship, or else are brought within the immediate presence or control of the officers of the ship. *The Cabarga*, 3 Blatchf. 75; *Pollard* v. *Vinton*, 105 U. S. 7, 9-11; *The Caroline Miller*, 53 Fed. 136; *The Guiding Star*, Id. 936, 943, and cases there cited.
>
> "Had the goods in question been lost while in transit from Jersey City to Roberts' Stores, where the ship lay, the steamship company might possibly have been personally liable for the goods; but plainly no lien for them could have arisen against the ship, because they would never 'have come to the benefit of the ship.' Per Nelson, J. (*The Cabarga*, supra). No, lien, therefore, arose when the goods were delivered to the truckmen in Jersey City, since the ship had not yet received the goods, and might never receive them. Something more had to be done, viz., to deliver them to the ship. As that delivery was

> an act necessary to the creation of a maritime lien, it follows that the 'furnishing to the ship,' so as to acquire a lien, was only completed at the place where the ship herself actually was.
>
> "As this was in the home port, no maritime lien could arise."

The Vigilancia has been frequently cited with approval in later cases, and shows of course clearly that a furnishing to the vessel in the sense of a delivery to her is as much a requisite of a maritime lien as a credit to her. It should also be noted in connection with *The Vigilancia* that when the supplies were ordered they were ordered for a vessel then named, and that they were actually delivered directly to the vessels by the truckmen.

The Vigilancia was a pre-statutory case; but there can be no doubt whatever that the Act of 1910 uses the expression "furnishing to" in its well recognized maritime meaning.

We quote the following from an article on the Act of 1910 by Mr. Fitz-Henry Smith, Jr., entitled "The New Federal Statute Relating to Liens on Vessels," 24 Harv. L. Rev., 182, 200:

> "And under the federal statute, as under the general maritime law, the things furnished must at least be 'appropriated' to the use of a designated vessel. For there can be no claim upon a given *res* unless it be shown that the necessaries (or services) were furnished specifically to that *res*. * * *
>
> "The Act of Congress is perhaps open to criticism for not defining the meaning of the term 'furnish.' That an explicit definition of this word would be beneficial may be admitted, for there is at present a conflict of authority upon the subject. Thus it is set forth in some cases that no lien can exist unless the supplies and repairs are actually used by or incorporated in the vessel; while others do not lay down so strict a rule. But the difficulty

of determining just where the line should be drawn led to the omission of any definition in the law, and the courts, as heretofore, must decide upon the facts in each particular case. The view of Addison Brown, J., in *The Vigilancia,* seems to be one now most generally recognized, namely, that 'There can be no delivery to the ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship in rem, until the goods are either actually put on board the ship or else are brought within the immediate presence or control of the officers of the ship'."

So, in *The Geisha,* 200 Fed., 865, a decision under the Act by the District Court for the District of Massachusetts, Judge Dodge said (p. 868):

> "To maintain a lien under that Act for materials to be used in repair, the materialman must show them to have been actually 'furnished to' the vessel, and I think the intended meaning of that phrase as used in the Act can only be the meaning generally given to it in the maritime law."

In *The Cimbria,* 156 Fed., 378, a lifeboat was ordered by the owner for the vessel, which was lying in her home port, Bangor, Maine. It was ordered by telegram and letter to be shipped f. o. b. New York. In ordering the lifeboat, *The Cimbria* had not been specifically mentioned or referred to, but she was the only vessel then owned by the owner, and this the libelants knew. The Court also found that the lifeboat was intended for *The Cimbria's* use, and that the libelants

> "so far as their own intent is concerned, gave credit to *The Cimbria* for the price of the lifeboat, and did not rely on the sole personal credit of her owner."

There was also ordered in substantially the same way from another libelant in Providence, Rhode Island, certain repair parts for the vessel's boilers.

The Court held that neither libelant had acquired a maritime lien. The Court said (p. 382, italics ours):

> "Neither of these petitioners can be held to have acquired any lien under the general maritime law. There are two reasons, *either of which would be sufficient.* The petitioners did not furnish these supplies to the vessel in the sense of the maritime law. The property in the goods passed to the owner of the vessel in New York and in Providence. Delivering goods to a carrier in New York or in Providence for transportation to a vessel in Bangor is not furnishing the goods to the vessel. 'There can be no delivery to the ship in the maritime sense, whether of supplies or cargo, so as to bind the ship *in rem,* until the goods are either actually put on board the ship, or else are brought within the immediate presence or control of the officers of the ship.' *The Vigilancia* (D. C.)., 58 Fed. 698, 700)."

The other reason for denying the lien was that the vessel at the time was in her home port.

It appears, moreover, that certain other repair parts for the vessel were ordered from Boston and were shipped to the vessel and put on her in Boston. As to these supplies it was also held that the seller had acquired no maritime lien: first, because the articles had not been "'furnished' to *The Cimbria* in the sense of the maritime law, either at Providence or at Boston"; and second, because (the case being a pre-statutory case) the evidence showed that the buyer had not relied on the credit of the vessel (p. 388).

A recent case under the statute almost identical with the case at bar on its facts with respect to the general contract under which the supplies were sold and the method of delivery thereunder is *The Cora P. White,* 243 Fed. 246, decided by the District Court for the District of New Jersey. Various supplies, including food, groceries, coal and a seine had been ordered by a steamship

company, which operated fishing vessels and also a factory on shore. Except the seine, all the goods ordered were useable either on the company's vessels or by its factory. The seller knew this to be the fact, but did not know and did not specify in what proportions the goods were to be used for vessels or for shore purposes. Three-quarters of the coal seems to have been used by the vessels and two-thirds of the culinary supplies. All the goods were ordered generally and were sold f. o. b. the sellers' places of business. It was held that none of the sellers had acquired a maritime lien. It is true that in this case there was no evidence that any of the sellers had relied on the credit of the vessel; but we think that a reading of the opinion will convince the Court that the decision would have been the same, even if this had not been the fact. The Court, after discussing a number of the cases relied on by the petitioner here and holding them to be inapplicable, spoke as follows (pp. 249-250):

> "The difference between those cases and the instant one is radical. In those the supplies were furnished or the services rendered to the vessels on orders so to do. In the case at bar the goods were ordered by the general manager of the Fertilizer Company without mention that they were intended for use on a vessel. They were not delivered or consigned to any vessel by the furnishers, but to the owner, as had been the practice for years.
>
> "In the case of coal, food, and culinary supplies, these were stored by the owner at its factory. Their arrival there was not a mere arrest or stoppage in *transitu*, but, so far as their delivery is concerned, they had reached their final destination. If the goods are furnished to the vessel in good faith, the materialman is not answerable for their misapplication. *The H. B. Foster,* supra. If not furnished to the vessel, their subsequent use thereon will not create a lien, as the furnisher's right to a lien arises, if at all, from what occurred at the time the supplies were ordered or furnished, not from

> ordered these repairs to be made at the libelant's wharf and sent her there for the purpose of receiving them, may not be heard to say that the libelant has not furnished them, the competing lien claimants are under no such disability. They have a right, not to be disregarded, to a strict construction of the statute, and to demand full proof of compliance with the conditions upon which liens may be acquired under it. * * * In view of the facts that the libelant had furnished the sections on the wharf all ready to go on board, and that it would unquestionably have done the little remaining to do in order to get them on board, but for a condition of affairs for which the owner was solely responsible, I shall hold that it furnished the sections to the vessel within the meaning of the act, and allow the $140 which it paid for them."

The opinion of the Court also calls attention to the difference between state statutes giving liens for supplies, etc., "for or on account of" vessels or "for" vessels, etc., and the Act of Congress "which requires proof that the repairs have been furnished 'to' the vessel." The Court said (p. 868):

> "The state statutes dealt with in the two cases just referred to, like many similar statutes of other states, made the lien depend upon proof that materials had been furnished in the repair of a vessel. The act of Congress now under consideration requires proof that the repairs have been furnished 'to' the vessel; so that cases under state statutes like those referred to do not deal with the precise question now presented."

See also *The Bethulia*, 200 Fed. 876.

The case on which the petitioner chiefly relies is *The Yankee*, 233 Fed. 919 (C. C. A., Third Circ.). The Yankee was a dredge and was engaged in dredging the Delaware River south of Philadelphia. Liens were claimed for

various supplies ordered for her. The facts as to these supplies were as follows (p. 921):

> "Each order specified the supplies to be for *The Yankee*, and in each instance the supplies were forwarded to her pursuant to shipping instructions accompanying the order. These instructions varied according to the source of the supplies and to the railroad over which they were to be shipped, but in each instance the instructions designated a wharf or pier in Philadelphia to which the supplies were to be delivered, whence they were carried either by tugs or barges of the Dredging Company or by other river craft to the Yankee in her position on the lower river.
>
> "The transaction of delivery which best presents the position of the claimant, is that of Charles H. Whitney and Company. The Dredging Company inquired of that company its price for dredge pipe. Whitney and Company replied, quoting price 'f. o. b. works' at an itnerior point in Pennsylvania, 'freight allowed to Philadelphia.' The Dredging Company gave the order as follows:
>
> "'Ship to Atlantic Dredging Company at Christian Street Wharf, c/o Armstrong and Latta Company, via P. R. R., marked 'For Dredge *Yankee,*' immediately, 1000 feet I. D. pipe.'
>
> "Pursuant to these instructions, the pipe was marked and billed 'For Dredge *Yankee,*' and shipped over the Pennsylvania Railroad to Christian Street wharf in Philadelphia, at which place it was unloaded by the Dredging Company and then loaded on one of its barges and towed to *The Yankee,* and by her received and used as a part of her tackle and equipment. The claimant maintained, and the Commissioner found, that as these supplies were not delivered by the libelant directly to the vessel, but were delivered to her by means of transportation instrumentalities which were not the agents of the libelant, the transaction, therefore, did not constitute 'furnishing * * * supplies * * * to a vessel' within the meaning of the act conferring a maritime lien, but constituted a delivery to the Dredging

> Company at the interior point of consignment in completion of a common law sale to that company."

The Court held that these facts were sufficient to give the suppliers a maritime lien under the Act. The precise holding of the Court is as follows (p. 925):

> "But as against the contention of the claimant, we hold that a material man may make actual delivery of supplies to a vessel in the maritime sense, by causing them to be transported by rail and water carriers by interrupted stages from their point of origin to the vessel side, when the transaction is begun by a valid order indicating that the supplies are for the vessel and are to be delivered to her, and is completed by an actual delivery to the vessel consistent with the instructions of the order and the intentions of the parties giving and accepting it."

Among the supplies furnished was certain coal, which had evidently been ordered and shipped under a contract to supply coal "for the whole fleet" to which *The Yankee* belonged.

As to this coal, all the opinion contains is the following (p. 927):

> "With respect to the claim of the last named libelant, which grew out of a contract to supply coal for the whole fleet, we are satisfied that in giving the order, the quantity to be supplied to and daily consumed by *The Yankee,* was mentioned and considered by the parties, and that of the total amount of coal supplied, a definite portion was appropriated for and furnished to *The Yankee* within the rule of law applicable in such cases. *The Kiersage,* Fed. Cas. No. 7762; *The Murphy Tugs* (D. C.), 28 Fed. 429; *McRae* v. *Bowers Dredging Co.* (C. C.), 86 Fed. 344."

Though the matter is not as clear as it might be, we think that the Court considered the facts in regard to the

coal to differ from the facts in regard to the other supplies only in the circumstance that the coal for *The Yankee* was ordered under a general contract to supply coal for the whole fleet, but that, *so far as the orders for coal under this general contract were concerned,* the orders were like the orders for the other supplies, namely, that they specified the coal to be for *The Yankee* and that in each instance the supplies were forwarded to her pursuant to shipping instructions accompanying the order.

If that is so, the case goes no further than the case of *Ely* v. *Murray & Tregurtha Co.* (supra), except in so far as it contains no suggestion that the rule might not apply as against a prior mortgagee. But however that may be, it is clear that the facts in *The Yankee* are in at least two vital particulars totally different from the facts in the case at bar. In the first place, in *The Yankee* the general contract was a contract for coal to be used solely by the vessels of the fleet and not partly by vessels and partly on shore. In the second place, there is nothing whatever in *The Yankee* to show that the coal delivered to *The Yankee* was first turned over to the owner to be later appropriated by him to *The Yankee* or to the other vessels of the fleet in such as yet unascertained quantities as the vessels might require; for the opinion states distinctly that the quantity to be supplied to and daily consumed by *The Yankee* was mentioned and considered by the parties and that a definite portion of it was appropriated to her use. It should, moreover, be noted that (assuming the decision as to the coal goes further than we think it does, and further than Judge Dodge thought it did) the question involved was given very scant consideration by the Court, and the only cases cited are three cases which, as will shortly appear, are totally inapplicable to the facts in the instant case.

The cases prior to *The Yankee,* therefore, go no further than this: that when definitely specified supplies

are ordered for a definitely specified vessel and are started by the seller on an uninterrupted course of transportation which ends at the vessel, the supplies have been furnished "to" the vessel, even though the supplies were delivered to the owner under a contract by which title passed to him en route. In *Ely* v. *Murray & Tregurtha Co.* (supra), Judge Dodge expressed a strong doubt as to whether this would be the rule as against prior mortgagees. In *The Yankee,* however, no such limitation of the rule is suggested, though it is difficult to see how the case can be reconciled with *The Vigilancia.* And, if the petitioner is right in its interpretation of the facts in *The Yankee,* the decision goes one step beyond this—namely, in holding that the seller may acquire a statutory lien where, under a general contract to supply the vessels of a fleet, a definite part of the whole is estimated to be for the use of some particular vessel and that particular part of the whole is actually appropriated and delivered to that vessel.

Nothing of that sort, of course, has been shown in the case at bar. The contract was not merely a general contract, it was a contract to supply the non-maritime as well as the maritime needs of the owner. Not only that, but there was no estimation of the relative amounts to be used on shore and by the vessels and no estimation of the relative amounts to be used by the particular vessels. There was no such estimation either in the contract itself or in the orders under it. The seller did not start the goods upon a continuous course of transportation from himself to the vessel. The supplies went into the owner's general stores. Their subsequent appropriation was to be made by him and by him alone. The statements of the Court in *The Cora P. White,* supra, as to the situation there are exactly applicable here:

> "Their arrival there was not a mere arrest or stoppage in transitu, but, so far as their delivery is

> concerned, they had reached their final destination * * *. They were ordered on the owner's general order to be held in store, for use at its convenience, as its business should subsequently require."

And finally, as shown above in our statement of the facts, the coal was mingled with other coal for which no lien could be claimed in such a manner that it could not even be proved how much of it was in fact used on any of the libeled vessels.

There is not even so much as a hint in any of the cases, either before the statute or since, that supplies sold for an eventual partial use on vessels, and delivered, as these supplies were delivered, under a contract and orders such as have been proved here, have been delivered "to" the vessels or to any of them in the maritime sense.

The facts in the other cases cited in petitioner's brief show the decisions in them to be wholly inapplicable.

Berwind-White Coal Mining Company v. *Metropolitan S. S. Co.*, 166 Fed., 782, on Appeal, 173 Fed. 471 (cited on p. 29 of petitioner's brief). The case was in equity and arose under a New Jersey statute which provided that:

> "Whenever a debt shall be contracted by the master, owner, agent or consignee of any ship or vessel within this state * * * on account of any work done or materials or articles furnished in this state *for or towards* the building, repairing, fitting, furnishing or equipping such ship or vessel * * * such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture, and continue to be a lien on the same until paid, and shall be preferred to all other liens thereon, except mariners' wages."

The first two pages of Judge Putnam's decision in the lower court show clearly that the language quoted

from it by the petitioner in its brief is entirely inapplicable to the question here presented. Judge Putnam begins by speaking of the liens as "mechanics' liens," and states (p. 783):

> "Whatever there is before us is in no way of a maritime character, and represents labor and materials furnished in the State of New Jersey by the petitioner then resident in New Jersey, upon these steamers, which were brought into New Jersey as hulls for the purpose of receiving the machinery in question here."

Having stated that the contract for the installation of the machinery in both steamers was a single one, he cites three cases under a Maine statute, which he says "is in substance the same as" the New Jersey statute. One of these cases is *The Kiersage*, 2 Curtis, 421 Fed. Cas. No. 7762, as to which the opinion states (p. 784):

> "The circumstances in that case were substantially the same as they are here, but Mr. Justice Curtis found no sound reason why the lien should not be sustained as to each vessel for the materials which actually went into it."

He also refers to a similar result reached under a Massachusetts case.

It is plain that a state statute which gives a lien for a debt incurred for work and materials furnished "for or towards" the building, etc., of a vessel can be no authority whatever on the question as to what is meant by the maritime law expression "furnishing to a vessel."

On the appeal in the Circuit Court of Appeals, practically the only question discussed was whether the lien given by the New Jersey statute could be enforced in equity in a Federal Court against the vessel in another state.

The Kiersage, 2 Curtis, 421 (cited on page 29 of peti-

tioner's brief). Precisely the same remarks apply to this case.

The Maine statute provided as follows:

> "Any ship carpenter, caulker, blacksmith, joiner or other person, who shall perform labor or furnish materials, *for or on account of any vessels* building or standing on the stocks or under repairs after having been launched, shall have a lien on such vessel for his wages or materials until four days after such vessel shall have been launched, or such repairs afterwards shall have been completed."

The District Court held the libelant entitled to a lien on both the vessels for which the supplies in question had been furnished, and that the lien might be enforced against either of them, irrespective of the value of the supplies furnished to it. On appeal, the Circuit Court reversing this decision, held the libelant entitled to a lien for the price of such materials as in fact were appropriated to *The Kiersage*. We have already referred to Judge Dodge's remarks on the cases arising under these state statutes in *The Geisha* (supra). As Judge Putnam said, in the *Berwind-White* case (p. 74, italics ours):

> "*As the New Jersey statute is framed*, no difficulty arises by reason of the contract being single."

The Murphy Tugs, 28 Fed. 429 (cited on page 32 of petitioner's brief). This was a case of a maritime lien. Libelant had a single contract with the owners for services as a diver and steam-pump engineer at specified daily wages on the vessels of a fleet. The services were actually furnished to the vessels libeled and the particular services were furnished on the orders of the various masters. The only difficulty that the Court found in sustaining libelant's claim arose from the fact that the contract of employment was single. The distinction between *The Murphy Tugs* and case at bar is obvious. Services, unlike supplies, can-

not be "delivered" to an owner for subsequent appropriation by him among his different vessels. They can be *contracted for* singly without reference to particular vessels: but when they come to be *rendered* ("delivered"), they must be rendered to the vessels in the most direct and immediate way. The only question, therefore, as to services (prior to the Act of 1910) would be whether the services were rendered on the credit of the vessel. There can, properly speaking, be no question as to whether services were "furnished to" a vessel in the sense of being delivered to the vessel.

An illustration will show the true analogy between the case of services rendered under a single contract and the case of supplies furnished under a single contract. Suppose, under a single contract for supplies for the vessels of a fleet, each order under the contract specifies the vessel to which the supplies are to be delivered. Suppose, further, that the supplies so ordered are actually delivered to the vessel for which they are ordered by the seller. There should be no question whatever that in such a case the seller would obtain a lien on each vessel to which he had furnished supplies under these specific orders, and that it would be quite immaterial that the contract itself was a single one to supply the whole fleet, without reference to particular vessels. Such a case precisely was *Cuddy* v. *Clement,* 113 Fed. 454 (C. C. A., First Circ.), and there the lien was disallowed only because, the contract having been made with the owner at the port of his residence, the *then* necessary showing of a credit to the vessels was held not to have been made. See also *Whitcomb* v. *Metropolitan Coal Co.,* 122 Fed. 941.

If in the case at bar the petitioner under its contract had received an order from the oil company: "Please deliver into or alongside the steamer *Martin B. Marran* 100 tons of coal under your contract with us," the petitioner undoubtedly would have been entitled to a statutory lien

for the 100 tons of coal so delivered; for he would have delivered those 100 tons *to* the vessel within the strictest requirements of the maritime law.

McRae v. *Bowers Dredging Co.,* 86 Fed. 344 (cited on p. 33 of petitioner's brief). The coal here was clearly furnished to the vessel in the strict maritime law sense:

> "The coal was furnished on the request of the general manager, and was delivered in scows, from which it was received on board the dredges as required for use" (p. 349).

The only question discussed by the Court was whether or not an understanding that credit was to be given the vessels could be implied. It appears, moreover, that the claims for liens were founded upon a state statute as well as upon the general maritime law. The statute read as follows:

> "All steamers, vessels and boats, their tackle, apparel and furniture, are liable: (1) For services rendered on board at the request of or on contract with their respective owners, masters, agents or consignees; (2) For supplies furnished in this state for their use at the request of their respective owners, masters, agents or consignees."

The *James H. Prentice,* 36 Fed. 777 (cited on page 37 of petitioner's brief). The case arose under a Michigan statute which gave a lien

> "for all debts contracted by the owner or part owner, master, clerk, agent or steward of such craft * * * on account of work done, or materials furnished, by mechanics, tradesmen, or other *in and about* the building, repairing, fitting, furnishing or equipping such craft * * * ."

The opinion shows clearly that the decision goes upon the wording of the statute. The Court said (p. 782):

> "The statute authorizes a lien for 'materials furnished in and about the building or repairing' of

> the craft. How those words can be tortured to mean that the material so 'furnished' must actually be incorporated into the craft, I am unable to see."

The materials in question, moreover, had been actually placed "either upon the vessel itself, or upon the dock at which she lay, for her use" (p. 781), but some of it had subsequently been taken away and used on other vessels. The materials were ordered for a specific vessel, and they would appear to have been delivered to the vessel even within the strict rule of *The Vigilancia,* since they had been actually brought "within the immediate presence or control of the officers of the ship."

The Worthington, 133 Fed. 725 (cited on p. 54 of petitioner's brief). The controversy was between the libelant and the owner, and the decision was placed squarely on an estoppel. The vessel was in a foreign port, and the libelant, at the owner's request, advanced the necessary funds to load her on the credit of the vessel. The owner had diverted some of the funds thus obtained. *Held,* that as against the libelant he was estopped from showing this. The 36 Fed. 493 (p. 727):

> "But when the owner in person orders supplies for his vessel in a foreign port, and upon the credit of the vessel, he being without funds, he is estopped to say, as against one furnishing supplies or money represented by him to be necessary for the ship, that the supplies or money so procured were diverted from the purpose for which they were obtained, and were not applied to the service of the ship. *The E. A. Barnard* (C. C.), 2 Fed.., 712, 716; *The Mary Chilton* (D. C.), 4 Fed., 847; *The Robert Dollar* (D. C.), 115 Fed., 218, 220)."

The Court also said, in distinguishing *The Wyoming,* 36 Fed., 493 (p. 727):

> "The question of estoppel did not arise, and was not considered. It may well be that, while

only be established by evidence both of a delivery to and of a credit to the vessel—except where the supplies or services were furnished or rendered to the vessel in a foreign port on the order of the master, in which case a credit to the vessel was presumed.

The Vigilancia, supra;
The Cimbria, supra.

In not a single pre-statutory case has evidence of a credit given to a vessel been held to dispense with the necessity of proof of a delivery to the vessel.

The change in the law, therefore, accomplished by the Act is simply to dispense with the necessity of proving a credit to the vessel. Had it been the intention of Congress to amend the law as to the necessity of a delivery to the vessel, Congress had the precedent of the numerous State statutes to which reference has been made, in which liens are given for work, labor, materials, etc., ordered or rendered "for or on account of" vessels, or the construction, repair, etc., of vessels, and similar expressions.

Prior to the Act the majority of the cases dealt with the question of credit to the vessel; the question in them was whether the facts sufficiently showed that an agreement or understanding existed to give credit to the vessel, although the supplies had been *delivered* to the vessel in the most immediate manner; and, of course, the controversy whether on this or that state of facts there had been a sufficient showing of credit to the vessel was the very controversy which the Act attempts to prevent from arising in the future by providing that a furnishing to the vessel in the sense of a delivery to it is alone sufficient to create a lien.

The proposition that the petitioner has to establish, however, is that a furnishing to a vessel in the sense

of a credit to it dispenses with the necessity of showing a furnishing to it in sense of a delivery to it. Not a case to this effect has been cited.

Instead, we are referred to a large number of pre-statutory cases in all of which immediate delivery of the supplies to the vessel was either assumed or undisputed, the question in dispute being whether, in spite of that fact, there had been a sufficient showing of a credit to the vessels. Cases of this sort in this Court are:

The Grapeshot, 9 Wall., 129;
The Lulu, 10 Wall., 192;
The Patapsco, 13 Wall., 329;
The Valencia, 165 U. S., 264;
The Kalorama, 10 Wall., 208.

If the construction of the Act which the petitioner's position thus requires to be put on it is the correct one, it is hard to see how the Act has effected any marked reform in the law. The object of the Act was to enlarge maritime liens and to simplify the law by dispensing with proof of credit to the vessel. It is now sought to dispense also with proof of delivery to the vessel. How? By evidence of credit given the vessel, thus throwing the whole subject again into the region of conflicting presumptions, doubtful inferences, and ambiguous parol understandings from which the Act of 1910 sought to rescue it.

POINT III.

THE RECORD DOES NOT PERMIT PETITIONER TO CLAIM A NON-STATUTORY LIEN UNDER AN EXPRESS CONTRACT OF GENERAL MARITIME HYPOTHECATION. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH ANY SUCH CONTRACT. EVEN IF SUCH A CONTRACT HAD BEEN MADE IT WOULD NOT HAVE CREATED A MARITIME LIEN ON THE VESSELS.

There is, we submit, only one other alternative, namely, that the petitioner has obtained a *non-statutory* lien by an express contract of maritime hypothecation.

1. *The petitioner is asserting a statutory lien and not a non-statutory lien, and on the record before this Court is foreclosed from asserting a non-statutory lien.*

We quote the following from p. 17 of the petitioner's petition for the writ of *certiorari*:

> "The District Court has held that no maritime lien could be created apart from the statute * * *. No cross appeal was taken by the libelant and the only question before the Circuit Court of Appeals was whether, in view of the understanding of the parties that the coal was furnished on the credit of the vessels, * * * a lien was impressed upon the libeled vessels by force of the statute."

This seems to be conclusive against petitioner's right to claim a lien created by an express general contract of maritime hypothecation, for it would appear obvious that such a lien is not a statutory lien.

2. *The evidence is not sufficient to establish an express contract of hypothecation.*

We have already commented on the evidence in our statement of the facts. Neither the District Court nor the Circuit Court of Appeals thought that this evidence was sufficient to establish an express contract of maritime hypothecation apart from the statute. We submit that the following from the opinion of Judge Dodge in the Circuit Court of Appeals is a fair statement of the effect of the evidence concerning the alleged contract for a maritime lien.

> "The evidence as to the precise agreement made in this case as to liens upon the Oil Corporation vessels is far from definite, and by no means such as would be sufficient in any event for the establishment of a maritime lien by express consent of the

owner. The general manager of the Oil Corporation testified that, as he understood, a maritime lien on the entire fleet should be security upon which the libelant was to furnish coal, but to such an agreement no effect can be allowed, as has been stated. We regard the evidence as establishing, at most, such an understanding as the District Court found to have existed—that 'the law would afford a lien upon the vessels for the coal'—that is, according to the libelant's present contention, upon each vessel afterwards supplied, for the coal supplied to her."

3. *Even if there had been an express contract of maritime hypothecation attempting to hypothecate each of the vessels to which coal might eventually be appropriated by the owner for the price of the coal so appropriated to it, such a contract could not have given the petitioner a lien superior to the lien of the respondent's mortgage.*

In the fourth and fifth Points of its brief the petitioner seems to take the position that an owner may, by an express contract, create a maritime lien on his vessels, which shall have precedence over non-maritime liens, substantially for any purpose that he chooses. It is clear that this is not the law.

The cases are unanimous in denying the validity of even express agreements for liens on a fleet under general contracts with the owners for supplies to them:

Astor Trust Co. v. *White Co.*, 241 Fed., 57;
The Cora P. White, 243 Fed., 246;
Munn v. *The Columbus*, 65 Fed., 430;
The Knickerbocker, 83 Fed., 843;
The Alligator, 161 Fed., 37;
The Newport, 114 Fed., 713.

In *The Alligator* (supra), the Court said, p. 42:

> "A lien does not and should not attach for a supposed credit given to a vessel, unless the service or supplies are clearly shown to have been rendered or furnished to the particular vessel to which the credit is given."

In *Astor Trust Co.* v. *White & Co.,* supra, there was an express agreement under a contract for supplies for a fleet of steamers that the seller should have a maritime lien on the steamers "singularly and as a whole" (p. 58) for the supplies. It appears that the seller thought that the supplies were intended for use only by the steamers. (See p. 59). The Circuit Court of Appeals for the Third Circuit, after a careful review of the cases, held that such an agreement could not create a maritime lien. It is to be noted that the seller clearly recognized that the lien it was asserting was not a statutory lien.

> "This question must be dealt with as one of general maritime law, since the appellees do not base their contention upon any statute, Federal or State" (p. 59).

The contract in the case at bar was not even a contract to coal a fleet, but a contract to supply the buyer's shore needs as well.

Such a contract clearly is not a maritime contract. In *Plummer* v. *Webb,* 4 Mason, 380, 388, Story, J., said:

> "I cannot see that the whole contract is here of a maritime nature. There are mixed up in it obligations *ex contractu* not necessarily maritime and so far the contract is of a special nature. In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction, that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime."

In *The James T. Furber,* 129 Fed., 808, 812, the Court said:

> "It has been repeatedly decided that to give the court jurisdiction over a contract as maritime, such contract must relate to the trade and business of the sea; it must be essentially and wholly maritime in its character."

See also

The Allianca, 65 Fed., 245;
The Advance, 71 Fed., 987;
The Cimbria, 156 Fed., 378, 384-385;
Berton v. *Tietjen's, etc., Co.,* 219 Fed., 763, 769.
The Harvey and Henry, 86 Fed., 657;
Pacific, etc., Co. v. *Leatham, etc., Co.,* 151 Fed., 440;
The Pennsylvania, 154 Fed., 9.

Even if the contract had been one solely for the Oil Company's fleet, it would not have been a maritime contract. *Diefenthal* v. *Hamburg, etc., Co.,* 46 Fed. Rep., 397; *S. S. Overdale Co.* v. *Turner,* 206 Fed, 339.

Clearly therefore no maritime lien in the strict sense can be created, even by express agreement, to the effect that a seller of supplies shall have a maritime lien on vessels to which the owner may eventually appropriate part of the supplies sold, where the contract of sale is a general contract to fill the buyer's general requirements for the season, non-maritime as well as maritime, and where the contract contemplates delivery into the owner's general stores and permits the owner to make such subsequent appropriation of the supplies to maritime or non-maritime uses as his needs may require.

As above shown, not only was the contract in question a non-maritime contract, but the orders and deliveries under it were also non-maritime, since none of them specified

that the coal ordered was for maritime use, much less for any particular vessel. It would appear indeed to be a contradiction in terms to say that supplies so sold are sold on the credit of vessels in the maritime law sense.

The petitioner cites *The Freights of The Kate,* 63 Fed. 707 (on appeal *The Advance,* 72 Fed. 793).

The case involved alleged express hypothecations of (1) freights, (2) vessels. The libelants had guaranteed letters of credit which were issued to the owner in the home port to enable the owner to disburse its vessels in Brazil with moneys derived from the guaranteed letters of credit. The owner was known by the guarantors to be insolvent. No vessels were specifically named. The supplies, etc., to pay for which funds had to be raised, had already been furnished; in other words, the liens of the supply men already existed. This appears clearly from the opinion in *The Advance:*

> "This firm apparently grew restive and indisposed to increase their line of credit to the corporation, and it therefore became indispensable that it should obtain financial assistance elsewhere, for the purpose of enabling its vessels to pay their debts in Brazil, and return to New York." (*The Advance,* p. 794.)
>
> * * * * *
>
> "It appears from the foregoing facts that the cases stand on this wise: At the home port of a line of steamships which are in a foreign port, the insolvent owners of the vessels obtain from the petitioners, who know the owners' insolvent condition, indispensable means, by the aid of which the owners are enabled to discharge the liens resting upon the vessels in the foreign port." (*The Advance,* p. 796.)

The holding was that as to the freights the hypothecation was good against a prior mortgagee and that it created a valid maritime lien by express contract on the

freights of all the vessels of the line, and not only of the vessels which were supplied with the funds which libelant's guarantee enabled the owners to obtain. With respect to the vessels themselves, the holding was that there was no sufficient evidence of an express contract of hypothecation. The Court held that the agreement of gua nty and hypothecation, being an agreement made in order to put the owner in funds to pay off maritime liens, was a maritime contract. This, of course, sufficiently serves to distinguish the case from the case at bar. With respect to the freights, moreover, the opinion of Judge Brown in the District Court relies strongly on the fact that freights were not mentioned in the mortgage, and much reliance is also placed on the circumstance that freights are after acquired property. (See *The Freights of the Kate*, pp. 715-716).

With respect to the liens claimed on the vessels, libelants themselves based their claim on the theory that they were subrogated to the rights of the original lienors, the persons who had furnished the supplies.

Neither *The Freights of The Kate* nor *The Advance* can be construed as authority for the proposition that an owner may, even by express contract, create a maritime lien, which shall have precedence over a prior mortgage, on a contract for supplies non-maritime in character and under which, moreover, no maritime delivery of the supplies to the vessels themselves is contemplated.

Petitioner's brief also cites *The Mary*, 1 Paine 671. This was a case of a formal bottomry bond given by the owner to obtain money with which to purchase cargo. The owner had previously mortgaged the vessel, but had been allowed to remain in possession. *Held*, the lien on the bottomry bond had precedence over the lien of the mortgage. The decision goes on the express ground that the mortgage

> "would not create any valid lien as against a subsequent bona fide purchaser or encumbrancer with-

out notice. * * * *On the principles of the common law as well as of equity* the claim of Daniel Young must be postponed to that of libelant" (p. 677; Italics ours.)

POINT IV.

BY DISPENSING WITH THE NECCESSITY OF PROVING CREDIT TO VESSELS THE ACT OF 1910 AT ONCE ENLARGES THE SCOPE OF MARITIME LIENS AND SIMPLIFIES THE LAW. TO DISPENSE WITH THE NECESSITY OF A MARITIME DELIVERY WOULD THROW THE LAW INTO CONFUSION AND OPEN THE DOOR TO MANY FRAUDULENT AND COLLUSIVE CLAIMS. MARITIME LIENS ARE STRICTI JURIS. THE PETITIONER'S COMPLAINTS OF THE HARDSHIP OF THE DECISION BELOW ARE THE COMPLAINTS OF A FAVORITE OF THE LAW ASKING FOR FURTHER FAVORS. THE HARDSHIPS, MOREOVER, ARE LARGELY FANCIFUL.

Maritime liens are *stricti juris* and are not to be extended by construction, analogy or inference.

As Judge DODGE points out:

> "When the statute was passed in 1910, no principles of the maritime law of the United States were more fully recognized or more firmly adhered to than those set forth in the familiar statements by the Supreme Court in *Vandewater* v. *Mills* (*The Yankee Blade*), 19 How., 382, 389, to the effect that maritime liens are *stricti juris* because they may operate to the prejudice of general creditors and purchasers without notice, and that they cannot be extended by construction, analogy or inference."

The following additional quotations will suffice:

The Larch, 14 Fed. Cas., 1139 (2 Curt. 427) at 1141:

> "A lien being an exception to the general rule, which entitles all creditors to participate equally in all the porperty of their debtor, and a maritime

lien being also a *jus in re,* which goes with the thing into the hands of purchasers, and so is embarrassing to commerce, it is *stricti juris;* must be derived from some provision of positive or customary law, which clearly confers it in the case in judgment; and it cannot be made out by way of argument from analogy, nor from considerations of convenience. Such considerations are for the legislature alone."

Munn v. *The Columbus,* 65 Fed., 430, 432:

"The courts are jealous of the extension of admiralty liens and more inclined to restrict than to extend them."

Prince v. *Ogdensburg Transit Company,* 107 Fed., 978, 982:

"Maritime liens for repairs and supplies, being secret incumbrances, are not favored. They are allowed only upon grounds of commercial convenience and necessity."

The Aurora, 194 Fed., 559, 560:

"A maritime lien is a privileged one, secret in character, overriding all other liens or transfers, possibly operating to the prejudice of creditors or purchasers without notice. In the nature of things it is *stricti juris,* and must be shown to exist."

The decisions under the Act continue to invoke the rule of *stricti juris.*

The Dredge A, 217 Fed., 617, 637;
Astor Trust Co. v. *White,* 241 Fed., 57, 62;
The Cora P. White, 243 Fed., 246, 248.

The change in the law of maritime liens contemplated by the act is clear. The act was intended to dispense with the necessity of proving a credit to vessels. It was not intended to dispense with the necessity of a maritime delivery

to vessels. In this respect the act leaves the law where it was, and it is the petitioner and not the respondent whose construction of the act would be "subversive."

The petitioner says that the case is one of unusual hardship. Practically every consideration of hardship adduced would apply equally to sellers of supplies to any other commercial enterprise or agency of transportation essential to the public welfare. It was no more necessary for the Oil Company's fleet to catch fish than it was for its factories to reduce them to oil. It is no more "manifestly to the interest of the public under prevailing economic conditions," that steamships shall run than that locomotives shall run. The petitioner's notions of hardship are in truth those of a somewhat pampered favorite of the law, who has forgotten how to help himself, asking for further favors.

It is obvious that with very little cost or trouble to itself, the petitioner could have perfected its maritime liens for the coal delivered to the Oil Company's steamers. In cases like the present one where the owner may call for the delivery of supplies before the arrival of vessels destined to consume them arrangements can almost always be easily made for the segregation of the supplies on the owner's property in the custody of the seller's custodian.

On the other hand the dangers of allowing maritime liens of the character claimed here are obvious. The opportunities for collusion between supplier and owner to the prejudice of mortgagees are great. Mr. Meadows was doubtless testifying truly; but consider the possibilities of fraud which the decision of the District Court opens up. A supply man who has furnished large quantities of supplies to a ship owner on the owner's credit, which supplies he has delivered to the owner generally, knowing possibly that the majority of them were destined for vessels, but not caring in the least what the owner does with them, suddenly discovers that the owner is insolvent. He then libels

There were also other notes outstanding for coal furnished in February and March, 1914.

It would appear, therefore, that the Oil Company did actually apply this draft when it was first received on account of the outstanding open account for the coal for which notes had not been given and which was unpaid for.

The subsequent application of this amount, on advice of counsel, after the receivership, to the note for $3,800 was therefore a reapplication to another account after the Oil Company had already elected to apply it on the open account for the coal for which notes had not been given.

It is submitted that after the receiver was appointed and certainly after these cases were brought, neither the Court nor the libelant had the right to change the original application of this payment to the detriment of the mortgagee and general creditors.

> *U. S.* v. *Kirkpatrick*, 9 Wheat, 720;
> *The Sophia Johnson*, 237 Fed. 406;
> 30 Cyc. 1250-1.

See also

> *The Mary K. Campbell*, 40 Fed. 906;
> *The Asiatic Prince*, 108 Fed. 287;
> *U. S.* v. *Brent*, 236 Fed. 771.

In *U. S.* v. *Kirkpatrick*, supra, Judge STORY at page 737 said:

> "The general doctrine is that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notion of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and a *fortiori* at the time of the trial."

The Sophia Johnson, supra, was a case in the District Court for the Western District of Washington, where it appeared that the intervener had sold oil from time to time to the owner of the vessel for commercial purposes and also for use of the vessel. It was also charged in a general account and all payments made were credited to such account. Later, after a controversy had arisen, the intervener sought to apply all of these payments against items for oil furnished for commercial purposes and to assert a maritime lien for all the oil furnished to the vessel. The Court *held* that an application of payment once made could not be changed so as to affect the rights of a third person, that payments should therefore be credited to the entire open account and that the intervener was entitled to a lien for only a proportionate part of the balance remaining unpaid. The Court at page 408 used language which we believe is pertinent to the facts of this case:

> "The payments, as disclosed by the testimony, were credited to the current account, in which were the items of oil furnished for the commercial purposes as well as the oil for consumption upon the vessel. Nothing appears in the account to indicate any intention on the part of the intervening libelants other than to furnish the oil upon the general current account. A party cannot intermingle items for which he has a lien with items for which he has no lien, and then assert a lien for the entire amount. Such is construed into a fraudulent intent, and the entire claim is defeated.
>
> "The payments made were applied to the general account, and that included some items for which a lien is now asserted, and after the application of the payment by the creditor, it cannot be altered by him, except by mutual consent. *Pearce* v. *Walker*, 103 Ala., 250, 15 South., 568. And where application is made at the time of payment, no change in appropriation can afterwards be made, so as to affect the equities of third parties."

If the decree of the Circuit Court of Appeals is reversed, we ask that respondent's Assignments of Error Nos. 10 and 11 on the appeal to the Circuit Court of Appeals be sustained, and that the amounts of the several maritime liens which may be awarded the petitioner to the extent of $2,000 be reduced *pro rata*, according to the ratio which the amount of each lien bears to the total sum due on the whole open account on August 24th, 1914.

POINT VI.

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED WITH COSTS TO THE RESPONDENT.

Respectfully submitted,

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Counsel for Respondent
SEABOARD FISHERIES COMPANY,